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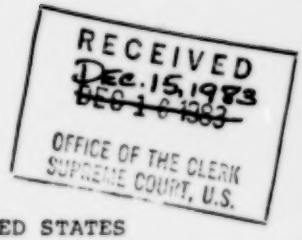

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT.

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QUESTIONS PRESENTED

1. Whether an Article III court has juridiction to review a final decision of the Merit System Protection Board where the Board action violated Petitioner's constitutional rights to due process of law and the Department of the Navy violated its regulations in discharging Petitioner.

2. Whether the Department of the Navy and the Merit System Protection Board violated Petitioner's rights to due process of law in discharging Petitioner from employment in violation of its regulation and by imposing the burden of proof on him in violation of 5 U.S.C. 7701(c).

PARTIES TO THE PROCEEDING

The Petitioner is WAYNE LINDAHL. The Respondent is THE OFFICE OF PERSONNEL MANAGEMENT.

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT.

John Murcko, Esq., on behalf of WAYNE LINDAHL, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Federal Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeal (majority, two concurring and two dissenting opinions)(Appendix A, 1a to 59a) is reported at 718 F.2d 391 (Federal Cir. 1983). The decision of the Merit System Protection Board is unreported (Appen. B, 60a- 69a). The opinions of the OFFICE OF PERSONAL MANAGEMENT are also unreported (Appen. C 70a-75a).

JURISDICTION

The judgment of the Court of Appeal was entered on September 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The authority relied upon include the Fifth Amendment, 5 U.S.C. 7701, 5 U.S.C. 7703, 5 U.S.C. 8347, 5 C.F.R. 1201.56 and FPM 831-1. (Appen. D, E, F. G and H.)

STATEMENT

Petitioner LINDAHL worked as a civilian employee for the Deparment of the Navy at Mare Island Naval Support Activity from 1968 to 1979. He commenced working as a welder and in 1972 changed his position to a security guard. Beginning in September, 1975, LINDAHL developed bronchitis. In December 1977, his physician, Dr. B. Allen, recommended the he retire on medical disability due to total and permanent disability caused by severe and recurring bronchitis. His condition was exasperated by the sandblasting, spraying and solvents used at the Naval Station in repairing and painting of naval vessels.[1/] (R. I. 47, 75-8, R. II 14-21)

On February 13, 1978 and April 10, 1978 LINDAHL was examined by Dr. J. P. Williams of the Naval Support Activity, and Dr. G. B. Levine of the U.S. Civil Service Commission. Both diagnosed him as having acute and chronic bronchitis and stated that he was disabled for his position. (R.I. 125, 134)

LINDAHL was placed on limited duty status on June 1979. On September 4, 1979 LINDAHL was given advanced notice by the Department of the Navy that he would be separated due to disability caused by his bronchial condition. (R.I. 35, Enclosure 1) On September 5, 1979, LINDAHL filed with the Department of the Navy the form requesting that he

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1/ R.I. or R. II. refers to the Record of the Merit System Protection Board filed in the Court of Appeals, Part I or Part II and includes Enclosures 1 to 8.

be retired due to his bronchial disability. (R.I 89, Enclosure 3)

On September 21, 1979, the Commanding Officer of the Naval Support Activity notified LINDAHL that he would be separated as a security officer on October 5, 1979. (R.I. 33, Enclosure 3) This was done in violation of Federal Personnel Manual, Section 831-1 which requires that the Office of Personnel Management (hereafter OPM) retain an employee in active duty status pending decision on an application for disability retirement. (See App. A, 37a; C, 70 a; and H, 80a-83a.)

On April 8, 1980 LINDHAHL was notified by OPM that his application for disability retirement was disapproved (R.I 38, App. C, 70a-71a, App. C). On December 4, 1980 OPM denied the request for reconsideration (R.I 7-9; App. C 72a-74a).

An application was filed with the Merit System Protection Board (hereafter MSPB) on January 12, 1981. A hearing was held on March 20, 1981 during which the MSPB hearing officer placed the burden of proof on the Petitioner in violation of Section 7701(c) and 5 C.F.R. 1201.56(a). (See R.I 160-9, App. A, 37a, 40a, App. B.) No witnesses ever appeared for OPM or the Department of the Navy. The only witness and evidence were presented by Petitioner. (R.I passim, R.II, passim.)

The MSPB recognized that 5 U.S.C. 7701(c)[2/] and the governing regulation of the OPM, 5 C.F.R. 1201.56(a)(iii), provides "that in appeals before the MSPB, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence...." (App. B, 61a)

2/ All references to 5 U.S.C. will be by "Section."

However, the MSPB went on to hold that the burden is on the Petitioner to prove by a preponderance of evidence that he is entitled to the disability retirement since he has a better knowledge of his condition (App. B, 62a). The MSPB ruled that LINDAHL was not disabled to the extent required for an annuity because he was not totally disabled for useful and efficient service. (App. B, 68a)

LINDAHL filed an appeal in the Court of Claims on June 10, 1981. On October 1, 1982 the case was transferred to the Court of Appeal for the federal circuit pursuant to the Federal Courts Improvement Act (FCIA). The government moved to dismiss on the grounds that judicial review is precluded by Section 8347(c). (App. A, 2a)

The Court of Appeals granted the government's Motion to Dismiss for lack of jurisdiction. The court held in banc (majority decision of only five of eleven judges and two limited concurring opinions) 8347(c) precluded judicial review of all decisions of physical disability retirement of the MSPB, other than those involving forced retirement for mental disability. (App. A, 8a)

The Court never addressed the issue whether it can review decisions of the MSPB where the petition alleges that the actions of the agency in separating an employee violated their own regulations and the actions of the hearing officer in allocating the burden of proof violated agency regulations and specific statutes. (App. A, 37a, 40a)

Instead, the Court held that LINDAHL is only entitled to judicial review of MSPB disability decisions if he cites "constitutional infirmity in the legislation governing disability retirement or in the classifications mode in the legislation." (App. A, 8a)

Next, the Court of Appeal ruled that it is not bound by the Supreme Court decision in Abbott Laboratories v. Gardner, 387 U.S. 136, 140-141 (1967) and its progency that

there is a presumption of judicial review over agency action. It based its ruling on the belief that under Section 8347(c), MSPB action is final. (App. A, 13a) It overruled twenty-five years of precedents allowing judicial review in this area. (App. A, 11a)

Next the Court ruled that Section 7703(a)(1) which provides for appeals for all MSPB decisions is not applicable. And that appeals of MSPB decisions on physical disability retirement claims are not appeable by claimants or by the OPM. (App. A, 19a-20a)

There were two concurring opinions. One by Circuit Judge NIchols agreed with the majority, but stated that "my conclusion is that preclusion of judicial review is never absolute in life." (App. A, 38a) The other, by Circuit Judge Nies, stated that he joined the majority opinion, but that not all aspects of a disability claim are precluded from judicial review. (App. A, 40a) Four other Circuit Judges dissented in two separate opinions. Their position was that in 1980, judicial review of physical disability was limited but not eliminated. When Congress amended Section 8347, it expanded judicial review in the area of involuntary mental disability retirement. Congress knew that limited review of MSPB decisions was available prior to the amendment, the OPM Director had told Congress that the prior standard would continue for non-mental disability cases and Congress did not change the wording of the finality clause. Therefore, Congress "intended to preserve that remedy." App. A, 43a-44a)

The dissent also stated that Section 7703(a)(1) provides for review of all decisions of the MSPB except for those of discrimination. Therefore, Section 7703 controls Section 8347(c). And finally Section 7701 covers any action appealable to the MSPB and all Section 7701 actions are reviewable by the court. App. A, 47a-58a.

REASONS FOR GRANTING THE PETITION

The Court of Appeal has held that the statute governing judicial review of MSPB decisions for physical disability retirement precludes any judicial review. This unwarranted action presents a misconstruction of a congressional amendment to the Federal Courts Improvement Act of 1982 (FCIA), Public Law No. 97-164, 96 Stat. 25; and the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, 92 Stat. 1111.

It is inconsistent with this Court's decisions that the judiciary must review agency action to insure compliance with an agency's procedural and substantive framework. It is further inconsistent with this Court's decisions recognizing a presumption that agency action is reviewable. Because the Court of Appeal has incorrectly decided an issue of significant importance to the members of the executive agency, and in contradiction to express agency policy, review by this Court is necessary.

1. This Court should grant certiorari to the Court of Appeal because the decision clearly conflicts with prior Supreme Court decisions. F.C.C. v. Broadcasting Service Organization, 337 U.S. 901 (1949); S.E.C. v. Otis and Company, 338 U.S. 843 (1949). Supreme Court Rules, Rule 17.1(c).

This Court in Schlesinger v. Councilman, 420 U.S. 738 (1975) held that a federal statute (10 U.S.C. 876) which provided that review of court-martial sentences by military tribunals is "final and conclusive" and that "all action taken pursuant to these proceedings are binding upon all...courts...of the United States" did not preclude judicial

review by Article III courts. They can intervene, by way of habeas corpus, injunction or back pay suits where the action taken at the court-martial level was unconstitutional or otherwise void.

Likewise, in Gusik v. Schilder, 340 U.S. 128 (1950), this Court held that the finality clause of Article 58 did not prevent review of court-martials by federal courts where there are due process violations. "We read the finality clause of Article 58 as doing no more than describing the terminal point for proceedings within the court-martial system." 340 U.S. at 132.

And, in Johnson v. Robinson, 415 U.S. 361 (1974) this Court also held that the finality language of 38 U.S.C. 211 did not bar judicial consideration of the constitutional provisions of the law concerning veterans benefits.

There is a recognized duty of Article III courts to require a government agency to follow the procedural and substantive framework established in the statute and the regulation that is administered by the agency. The courts have the duty to prevent the agency from violating constitutional rights. Dunlop v. Bachowski, 421 U.S. 560, 567-568 (1972)

Likewise, this Court has consitently held that where a federal executive official has exceeded its statutory authority, the court will review the action to determine whether the official was acting within the scope of its lawful powers. American School of Magnetic Hearing v. McAnnulty, 187 U.S. 94 (1902); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); Harmon v. Brucker, 355 U.S. 579 (1953).

And administrative action of the executive department in violation of its own regulations establishing procedures for ahearing and review are invalid. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954);

Service v. Dulles, 354 U.S. 363, 388 (1957). The head of an executive department must comply with its own procedural regulations in dismissing an employee and failure to follow its own regulations amounts to a due process violation. Vitarelli v. Seaton, 359 U.S. 535 (1959).

Here the Court of Appeal failed to follow the concept of review of administrative action of the OPM and MSPB which was in violation of their own regulations and statutory provisions. The Petitioner LINDAHL raised two issues of constitutional dimension which were ignored in the majority decision. First, Petitioner raised the issue that the Department of the Navy violated its own regulations under FPM 831-1, S 10-10(a)(6), when it separated him. (App. A, 37a, 40a) "The agency is required to retain an employee in an active duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement...." (App. H, 83a) The agency here initiated the disability separation on September 4, 1979. (App. I, 84a) It separated LINDAHL on October 5, 1979. (App. K, 88a) The OPM final decision was issued on December 4, 1980. (App. C, 72a-74a)

The Court of Appeal in its ruling stated "A facile formula based on fear of faceless functionaries would be such a grant, for the court would have to exercise jurisdiction to determine whether legal or procedural error occurred." (App. A, 15a)

Next, LINDAHL raised the issue in both the MSPB and the Court of Appeal that the MSPB incorrectly placed the burden of proof upon him instead of the OPM. (App. A, 38a, 40a; App. B, 61a-62a) Both Section 7701(c)(1)(B) and 5 C.F.R. 1201.56(a)(iii) places the burden of proving that the agency's decision is supported by a preponderance of the evidence on the agency. The OPM never even appeared at the MSPB hearing. (App. B, 61a-62a) But the MSPB placed the burden of proof on LINDAHL. Ibid.

It is well established the procedural due process prohibits the deprivation of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972) The extent of protection to be afforded to persons by procedural due process is greatly influenced by the grevious loss he (she) may suffer. Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970).

The concept of the burden of proof and the standard of proof is a concept that is embodied in the Fifth Amendment's Due Process Clause in civil cases. Santosky v. Kramer, 455 U.S. 745, 754 (1982); Woodby v. INS, 385 U.S. 276, 285 (1966). The function of the burden and standard of proof in civil cases is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Addington v. Texas, 441 U.S. 418, 423 (1978). This reflects how the risk of error should be distributed between the litigants and the weight of the private and public interests involved. MacLean v. Huddlestone, ___U.S.___, 51 U.S.L.W. 4099, 4103 (1983).

Where the government has the burden of proof in civil matters, it must support its allegations by "clear, unequivocal and convincing evidence." Woodby v. INS, 385 U.S. 276, 285.

By transferring the burden from the OPM to the employee, the risk of an erroneous deprivation of private interests is increased to the employee. He (she) must prove that he is disabled when the opinion concerning the ability to perform the job is usually in the hands of experts or of his superiors. This is especially true where, as here, the disability termination was involuntary. The risk of error is decreased where the burden of proof is on the OPM. It has more expertise and resources and it has been so designated by Congress in Section 7701(c)(1)(B) and OPM regulations in 5 C.F.R. 1201.56(a)(iii).

The MSPB violated LINDAHL's due process rights by placing the burden of proof upon him. It took the OPM out of the procedural morass. The risks were increased and it caused an incorrect deprivation of private interests.

This fundamental procedural issue is a constitutional issue that the Federal Circuit must hear and consider.

But the Court of Appeal stated in its opinion that LINDAHL can only raise constitutional questions where it involves "infirmity in the legislation governing disability retirement or in the classification made in that legislation." (App. A, 8a) And that "Allegation of procedural errors are ...a matter for investigation and legislation by the Congress, not the courts." (App. A, 15a-16a)

This decision stands in contravention to over eighty years of decisions of this Court which allow review of executive action taken in excess of the statutory provisions or in violation of the regulations. Beginning with McAnnulty and up until Schlesigner, action of the executive branch in violation of constitutional rights of the petitioner is subject to judicial review. The finality language of Section 8347(c) does not prohibit such review. It only limits the review. And Congress has never indicated that it has prohibited review for constitutional or due process violations in this area.

Even the concurring opinion in LINDAHL v. OPM recognizes the error of the majority opinion when it states, "We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective." (App. A, 39a)

The majority did extend the limitation on review to include procedural errors in violation of regulations, statutes and the constitution. The decision contravenes numerous Court decisions.

2. There is a general presumption stated by this Court that agency action is subject to judicial review. And while the scope of judicial review may be limited by statute, judicial review will be precluded only if there is a clear and convincing congressional intent to review such actions. Barlow v. Collins, 397 U.S. 159, 166-167 (1970); Rusk v. Cort, 369 U.S. 367, 379-380 (1962).

"The Adminstrative Procedure Act provides specifically not only for review of agency action made reviewable by statute but also for review of final agency action for which there is no adequate remedy at law." Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The generous review provisions of the Act must be given a "hospitable interpretation." Shaughnessy v. Pedreiro, 349 U.S. 48, 51 (1954); United States v. Interstate Commerce Communications, 337 U.S. 426, 433 (1948).

The Court of Appeal refused to follow this judicial presumption. That presumption is embodied in Section 7703 which provides that "Any employee...aggrieved by a final order of the MSPB may obtain judicial review of the order...." It found to the contrary that there is no presumption and that Section 7703 does not apply. Instead, it found that Congress never intended judicial review in this area of physical disability claims. (App. A, 8a)

The courts have allowed review of agency decisions under Section 7703(c) based on the substantial evidence test. And the courts reviewing agency decisions under Section 8347(c) as construed by Scroggins[3/] allow review of legal and procedural errors, but do not permit a re-examination of the evidentiary basis for an agency's ruling. McCard v. MSPB, 702 F.2d 978 (11th Cir. 1983); Pitzak v. OPM, 710 F.2d 1476, 1478 (10th Cir. 1983).

3/ Scroggins v. U.S., 397 F.2d 295 (Ct. Cl.)

This construction and not that of the Court of Appeal below overruling Scroggins, which limits rather than bars judicial review, is more consistent with the presumption favoring judicial review of agency determination. Parodi v. MSPB, 702 F.2d 743, 746.

But even more important, there was no clear and convincing evidence of a contrary legislative intent against judicial review for this ruling below. The Congressional history of the FCIA showed that Congress provided for a grant of review of all MSPB decisions under Section 7703. It did not exclude any except for those of discrimination. Congress gave plenary power to the Federal Circuit to review. The Senate Report states that Section 7703 "applies to judicial review of all final orders on decisions of this Board...." S.Rep.No. 969, 95th Cong. 2d Sess. 62, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2784. And the House Report on Section 7703 stated that the federal court of appeal has "jurisdiction of any appeal from a final order or final decision of the Merit System Protection Board." H.R.Rep. No. 312 at 18 (App. A, 54a).

The finality clause of Section 8347(c) regarding disability has been in existence since 1948.[4/] The Court of Claims has consistently interpreted the finality clause to limit review of administrative decisions only "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some error going to the heart of the administrative process." Gaines v. United States, 158 Ct.Cl. 497, 502, cert. denied 371 U.S. 936 (1962); Scroggin v. United States, 397 F.2d 295 (Ct. Cl.) cert. denied, 393 U.S. 952 (1968). The Court of Claims has consistently interpreted the finality clause of 8347(c) to bar review only of any factual findings of the

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4/ Originally finality was in Section 724 and later in Section 2266.

Civil SErvice Commission (now OPM). Turner v. OPM, 707 F.2d 1499, 1502 (D.C. Cir. 1983)(emphasis added).

The "Scroggins formula" was the law in 1980 when Congress passed the amendment to 8347. (App. A, 43a). The purpose of the amendment was to prevent the abuses of involuntary (agency initiated disability retirement determination based on an emplcyee's mental condition. It was to be subject to review under Section 7703 (review of law and facts) rather than the narrower provisions of 8347 (review of law only). This was to prevent retirement of unpopular employees. See H.R. No. 1080, 96th Cong. 2nd Sess. 2-3 (1980) 126 Cong. Rec. H 5023 (June 16, 1980); S.R. No. 1004, 96th Cong. 2d Sess. 2; 1980 U.S. Cong. & Admin. News 5986.

The legislation originated in the House Committee on Post Office and Civil Service, And the House Report stated that the method to curb these abuses was to expand the scope of review beyond the "Scroggins formula" for mental disability cases only to allow review of the substantial evidence under 7703. H.Rep. No. 1080, 96th Cong., 2nd Sess. 4 (1980); Parodi v. MSPB, 702 F.2d 743, 747-8 (9th Cir. 1982).

And further the legislative history of the 1980 Amendment indicates that Congress amended the statute based, in part, on OPM's representation that Section 8347(c) already permitted limited judicial review of all disability proceedings. Alan K. Campbell, the Director of OPM, wrote to Congress on May 14, 1980 stating:

> We believe it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements....It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination. (Emphasis added.)
>
> H.R. NO. 1080 at 8; S.R. 96-1004. Parodi v. MSPB, 690 F.2d at 748.

Far more deference is due to the agency's contemporaneous explanation of the effect of a statute then its position before the Court of Appeal during litigation. Udall v. Tallman, 380 U.S. 1, 16 (1965).

Thus, the history and wording of the 1980 amendment shows that Congress intended to expand judicial review for involuntary disability retirement of an employee's mental status. Congress did not intend to bar all judicial review of disability determinations. So the Court of Appeals below was incorrect in its position that there was clear and convincing evidence of congressional intent to bar review. The opposite is true.

Had Congress intended to prevent judicial review of factual and legal questions, it could have done so as it did in 38 U.S.C. 211(a). Prior to its 1970 Amendment, 38 U.S.C. 211 so provided.

Thus, the conclusion is inescapable that the Court of Appeal ignored and refused to follow the judicial presumption favoring judicial review of agency actions. But it failed even more so by not showing the clear and convincing evidence that Congress intended to bar judicial review of agency actions in the area of physical disability retirements. It buried itself in Section 8347(c) and ignored the legislative history, prior precedents and Section 7703.

3. A third basis for review of the Court of Appeals decision is the law of this Court that provides that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary to regard each as effective. Morton v. Mancuri, 417 U.S. 535, 551 (1974); Pitzak v. OPM, 710 F.2d 1476, 1479.

The Court of Appeal held that it has no jurisdiction under Section 7703 to review MSPB decisions on physical disability retirement claims. It believes that Section 8347(c)(d) bars such review. (App. A, 8a) The majority decision concentrates on Section 8347 and falls victim to relativism. It fails to recognize the broad authority of the federal circuit to review as set out in Section 7703(a)(1) and sets

itself beyond that section. Likewise, it prohibits OPM from petitioning for review of any MSPB decision despite the express language of 7703(d). It slams the courthouse door on individuals and OPM alike in Section 8347 cases involving physical disability retirement claims.

But this ruling is contrary to the Morton rule. The anomaly created by the majority is obviated by regarding both Section 7703(a)(1) and Section 8347(c) as effective. Both statutes are capable of co-existence. This intent of Congress is to give full review of mental disability retirement cases arising under Sections 7703 and 8347(d) while foreclosing only judicial review of the sufficiency of the evidence under 8347(c) in physical disability retirement cases. This will preserve the duty of the courts to require an executive agency to follow the statutory and regulatory framework of the agency.

4. An irreconcilable conflict between different court of appeals on the same matter of general law is a basis for review by this Court. Supreme Court Rules, Rule 17.1(a). Avco Corp. v. Aero Lodge #135, 390 U.S. 557, 559 (1968); Northeastern National Bank v. United States, 387 U.S. 213, 217 (1966).

The Court of Appeal below made two rulings that are in conflict with four other circuits. First, it ruled that the finality clause of Section 8347(c) prohibits the exercise of all federal court jurisdiction to review any physical disability retirement claims. (App. A, 8a)

Second, it ruled that the "Scroggin formula" on review of any decision of the OPM is invalid. Thus, review of OPM decisions for procedural or constitutional error is precluded. (App. A, 11a)

The following decisions take the same position as LINDAHL: Morgan v. OPM, 675 F.2d 196 (8th Cir. 1982); Chase v. OPM, 695 F.2d 790 (4th Cir. 1982); Campbell v. OPM, 694 F.2d 305 (3d Cir. 1982).

But the following circuits have ruled (1) that federal court of appeals have limited jurisdiction to review denials of physical disability retirement claims and (2) that

the "Scroggin formula" is the correct rule of judicial review. Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982); McCord v. MSPB, 702 F.2d 978 (11th Cir. 1983); Turner v. OPM, 707 F.2d 1499 (D.C. Cir. 1983); Pitzak v. OPM, 710 F.2d 1476 (10th Cir. 1983); Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983). (App. A, 9a-10a)

Although Congress under the FCIA has vested exclusive jurisdiction in the Federal Circuit Court of Appeals since 1982 over MSPB decisions, there are two good reasons for granting certiorari. The "Scroggin formula" is broader than just disability claims. It applies to all administrative decisions. Turner v. OPM, 707 F.2d at 1502. In fact this Supreme Court in United States v. Clark, 445 U.S. 23, 34 (1980) stated "Because we hold that the Civil Service Retirement Act expressly allows the appellee's children to receive survivor's annuities, there is no question that the Court of Claims below had both jurisdiction to entertain their claims and to grant recovery."

Thus, five circuits will still be following the "Scroggins formula" to adjudicate administrative claims, while four others will not.

Second, cases still pending before the circuits filed prior to 1982 must be resolved and they will follow either Parodi or Morgan. The conflict must be resolved.

5. This issue of the jurisdiction of the Federal Circuit in disability cases is the first interpretation of that court's jurisdiction. And it is of considerable importance to the statutory scheme intended under the FCIA. The interpretation of its jurisdiction is an "important one of first impression" and must be resolved by this Court. American Federation of Musicians v. Wittstein, 379 U.S. 171, 175 (1964).

Congress gave the Federal Circuit plenary authority under Section 7703 over MSPB decisions. With Lindahl, the Court has rejected that authority over federal employees. They are left to the caprice of the agency without judicial review. This was clearly not intended by Congress. This

Court must resolve this important issue.

Next, the Federal Circuit decision below is at war with the well-established construction of the statute by the administrative agents charged with its enforcement. Morton v. Ruiz, 415 U.S. 199, 201-2 (1973).

The Director of OPM has stated to Congress that Section 8347(c) and (d) was meant to expand review of the federal courts on mental disability but to allow review to remain on legal issues for physical disability claims. (App. A, 43a)

Likewise, the MSPB has ruled that Section 8347(c) is only a restriction on judicial review in disability determinations and is not a ban on such review. Chavez v. OPM, 6 MSPB 343 (1981).

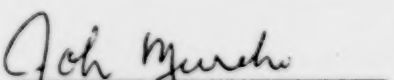
Thus, this is an important issue on review of OPM and MSPB disability rulings and this Court should issue certiorari to resolve this issue.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED: December 12, 1983

Respectfully submitted,



JOHN MURCKO
Attorney for Petitioner
WAYNE LINDAHL

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

PETITIONER'S APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT.

JOHN MURCKO, ESQ.
473 Jackson Street
3d Floor
San Francisco, CA. 94111
415-986-5591

Attorney for Petitioner

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL Petitioner, v. OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	Appeal No. 39-81

DECIDED: September 22, 1983

Before the court In Banc.

MARKEY, Chief Judge.

Petitioner Lindahl appeals from a decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of his request for a disability annuity. We order dismissal of the appeal for lack of jurisdiction.

Background

On September 5, 1978, Lindahl elected to retire, on the basis of disability, from his civilian employment with the United States Navy. On September 25, 1979, the Navy notified him that he would be separated for physical disability. He accepted the disability separation but claimed an annuity. On March 21, 1980, OPM's denial of the annuity was affirmed in a comprehensive opinion, No. SF 831L8110492, in which MSPB pointed out that the degree of disability required for voluntary separation is less than that required for entitlement

APPENDIX A

to an annuity, and that Lindahl was not disabled to the extent required for an annuity. Lindahl filed an appeal in the Court of Claims, on June 10, 1981, and the case was transferred to this court on 1 October 1982 in accord with the Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164, 96 Stat. 25.

The government moved to dismiss, citing as alternate grounds: (1) judicial review is precluded by 5 U.S.C. § 8347(c); (2) jurisdiction is lacking under 5 U.S.C. § 7703 because Lindahl is not an "employee". Because we dismiss on (1), we need not and do not in this case determine the meaning or scope of the word "employee" in § 7703.

Opinion

Judicial Review is Precluded by 5 U.S.C. § 8347(c)

Congress established a retirement system for federal employees. 5 U.S.C. § 8337. The right to retirement per se, or to a retirement annuity is not founded in the Constitution. The rights created having their genesis in a statute, Congress was at liberty, Dismuke v. United States, 297 U.S. 167, 172 (1936), to establish a statutory scheme in which the decisions governing eligibility for disability retirement and annuities would be made entirely within the administrative process. Congress was further at liberty to amend that scheme to provide a review step within the administrative process, and to provide for judicial review of one type of such decisions.

EDITOR'S NOTE

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Congress did precisely that, the amended statutory scheme being set forth in the current statute at 5 U.S.C. § 8347(c) and (d):

> (c) The Office [OPM] shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d) (1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(d) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

The emphasized matter is that added in 1980 by Pub. L. No. 96-500, 94 Stat. 2696.

The parties' briefs and arguments do not note that the OPM decision in this case was rendered before the January 1, 1981 effective date of the 1980 amendment. When the OPM

decision was rendered, sections 8347(c) and (d) were as above quoted, but without the emphasized matter. We are required, absent manifest injustice, to apply the law as it exists at the time of our decision. Bell v. New Jersey and Pennsylvania, 103 S. Ct. 2187, 2199 (1983) (White, J., concurring). In the present case, no such manifest injustice would result, which may account for the parties' discussion of the statute as it was amended in 1980.

We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a voluntary physical disability retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1). In such cases, the initial decision is that of the employee who has elected to retire, and who has asserted disability as the reason, and who has then sought an annuity.

Lindahl here seeks judicial review of MSPB's decision on the "question" of his disability as entitling him to an annuity. The so-called "finality clause" in § 8347(c) states unequivocally and unambiguously that administrative decisions on questions of disability "are final and conclusive and are not subject to review". It is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence.

The finality clause first appeared, in relation to survivorship benefits, in 5 U.S.C. § 724, in 1948. No

legislative history existed in relation to that section, and none is needed in view of its continued unambiguous nature. In 1956, as codified at 5 U.S.C. § 2266(c), the preclusion of review was extended to include disability cases.

Subsequent legislative enactments and court decisions dealing with federal employee retirement, as well as those dealing with other rights of federal employees, have resulted in substantial confusion respecting the limited question before us.

Respecting retirement, Congress passed in 1978 an amendment to § 8347, Pub. L. No. 95-454, 92 Stat. 1111, providing for review by MSPB of OPM disability decisions. § 8347(d). By that amendment, Congress continued to limit the enforcement of voluntary disability retirement rights to the administrative process. It nonetheless provided, to an individual dissatisfied with an OPM decision, an appeal to a quasi-judicial tribunal independent of OPM and affording appropriate administrative review procedures.

In the 1978 amendment Congress let stand the provision in § 8347(b) that OPM "shall adjudicate all claims under this chapter". Congress did not specifically spell out in the statute that § 8347(d) was an exception to the finality clause in § 8347(c).

The history of what Congress did, up to and including its adoption of the 1980 amendment indicates its present intent to deny judicial review of MSPB decisions on questions of

disability, other than those involved when an agency forces retirement for mental disability. By the language it selected in constructing § 8347, Congress began with a total limitation to the administrative process, stopping the process with the decision by the Civil Service Commission (now OPM). In 1978, Congress provided for review of OPM decisions, still within the administrative process, by MSPB. In reenacting § 8347(c) without change, Congress thus provided that the review process of § 8347(d) ended at the MSPB level. Until 1980, Congress had at no time specifically granted jurisdiction to any court to review any decision, by either OPM or MSPB, on questions of disability and dependency. Then, in 1980, for the first time, Congress provided for judicial review, but only to individuals forced to retire at the instance of an agency on the basis of the individual's alleged mental condition. In that 1980 amendment, Congress clarified the relationship between § 8347(c) and (d) by inserting in the former "Except to the extent provided under subsection (d)".

Thus, the plain language of the statute, with which we must begin, Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979), expressly precludes review beyond the administrative process, i.e., it precludes judicial review, of denials of voluntary disability retirement annuity claims such as Lindahl's. An express statutory provision that certain decisions of an adminstrative agency "are final and conclusive and are not subject to review" should not be interpreted as

though it said such decisions "are not final and are not conclusive and are subject to some judicial review". Certainly that interpretation should not be adopted after Congress has in the same statute provided that other decisions are subject to review. To so read the review-precluding language of the present statute would appear not a judicial act of interpretation but a legislative act of repeal.

Whatever may be said of the finality clause in the abstract, the subsequent actions of the Congress providing specific and particular exceptions to that clause, one administrative, the other judicial, provide compelling evidence of its intent to preclude judicial review of MSPB decisions on voluntary disability retirement claims. Congress having provided for administrative review in § 8347(d)(1), the express exclusion of review in § 8347(c) can relate only to judicial review.

Where, as here, Congress has repeatedly revisited the statute, and where, as here, those self-reviews of its earlier handiwork included two in which it has spelled out specific exceptions to its total preclusion of review, and the specific forums for each, it is not within the province of a court to create additional exceptions. Congress has addressed the question of exceptions, has in the 1980 amendment created legislation without ambiguity or inconsistency, has assured uniformity in the retirement law by making certain discrete disability claims decidable exclusively by MSPB and others

exclusively reviewable in this court, has dealt with all classes of disability annuity claimants, and has provided specific means through which each class may pursue claims for annuity. No basis exists on which this court could exercise an assumed power to create some new class of annuity claimants or to design some new procedure that would include a right of such claimants to appeal to this court.

Lindahl is not within the class of claimants to which the right to judicial review of MSPB disability decisions is provided by § 8347(d)(2). He cites no constitutional infirmity in the legislation governing disability retirement or in the classifications made in that legislation.

This court's grant of jurisdiction to review MSPB decisions is broad but not unlimited. Among the limitations on that grant is necessarily a statute expressly excluding review of certain decisions. Such a statute is spelled out in 5 U.S.C. § 8347(c) and (d). The government's motion to dismiss must therefore be granted.[1/]

Asserted Bases For Jurisdiction

As above indicated, legislation creating rights of federal employees, and the legislative history of that

1/ Lindahl suggests that 28 U.S.C. § 1491 may supply jurisdiction in the Claims Court to determine the question of whether his disability entitles him to an annuity following his voluntary disability retirement, the claim having been denied by OPM and by MSPB after review under § 8347(d)(1). Jurisdiction of the Claims Court being a matter for its decision in the first instance, we need not and do not here respond to Lindahl's suggestion.

legislation, have clouded the search for clarity that is an integral part of the judicial process. Equally well intentioned and careful courts have reached differing conclusions respecting what the intent of Congress was when it enacted and amended § 8347. Intent of Congress being the touchstone in cases of statutory interpretation, we have been cited to a number of bases upon which it might be held that Congress intended this court to exercise a jurisdiction to review MSPB decisions on voluntary disability retirement annuity claims.

(a) The Scroggins Line of Cases

In Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968), it was said that the finality clause of § 8347(c) meant that "at best, a court can set aside the Commissioner's determination only 'when there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination'".

Though the "procedural departure, legislation misconstruction, or like error" quotation was from Gaines v. United States, 158 Ct. Cl. 497, 502, cert. denied 371 U.S. 936 (1962), it has been labeled the "Scroggins formula", and referred to in: Polos v. United States, 621 F.2d 385, 391-92 (Ct. Cl. 1980); Fancher v. United States, 588 F.2d 803, 806 (Ct. Cl. 1978); Allen v. United States, 571 F.2d 14, 17 (Ct.

Cl. 1978); McFarland v. United States, 517 F.2d 938, 942-43 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); McGlasson v. United States, 397 F.2d 303, 307 (Ct. Cl. 1968).

The "Scroggins formula", though quoted from Gaines in Scroggins, had its genesis in Smith v. Dulles, 236 F.2d 739, 742 (D.C. Cir. 1956), cert. denied, 352 U.S. 955 (1956). Smith was one of three cases decided on the same day and denying reinstatement, back pay, and declaratory judgments. A footnote in Smith traces the "formula" back to Powell v. Brannan, 196 F.2d 871, 873 (D.C. Cir. 1952), a reduction-in-force case having no relation whatever to retirement. (See reference to "decisional leapfrogging" in Griswold, The Judicial Process, 28 Rec. A. B. City N.Y. 14, 24-25 (1973)).

Smith, Gaines, Scroggins, McGlasson, and McFarland dealt with forced retirements for mental conditions. Pancher, Allen, and Polos dealt with forced retirement for physical disability. No case dealt with a voluntary retirement claim for annuity, and in no case (except in Allen, overruled in Polos) did application of the "Scroggins formula" result in reversal.

We face here no settled case law. Sections 8347(c) and (d), and the "Scroggins formula" have appeared in the opinions of other courts with varying results, some rejecting it, see: Campbell v. OPM, 694 F.2d 305 (3d Cir. 1982); Chase v. OPM, 695 F.2d 790 (4th Cir. 1982); Morgan v. OPM, 675 F.2d 196 (8th Cir.

1982), some applying it, Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982); McCard v. MSPB, 702 F.2d 978 (11th Cir. 1983); Turner v. OPM, No. 82-1436 (D.C. Cir. May 17, 1983); Pitzak v. OPM, No. 82-1592 (10th Cir. July 14, 1983), and one accepting it with a limitation, Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983). Our independent consideration has led us to what is in our view the sounder conclusion.

If the cases of our predecessor court referring to the "Scroggins formula" were interpreted as holding that § 8347(c) and (d) leave room for judicial review of voluntary disability retirement annuity claims, those cases to that extent would have to be viewed as wrongly decided and overruled.

The concern that apparently lead to the initial application of the "Scroggins formula" by our predecessor court, i.e., that administrators might unfairly force individuals from federal employment with an attached mental condition "stigma", has been fully met by Congress' enactment of § 8347(d)(2). The cases dealing with that form of retirement are therefore simply no longer viable.

Because all references to the "Scroggins formula" by our predecessor court appear in opinions of that court dealing with forced retirement, the Scroggins line of cases cannot serve as a basis for an assertion of jurisdiction to review an MSPB decision on voluntary retirement like that presented here.

(b) Review of Agency Action

Treatment of 5 U.S.C. § 8347(c) in the courts since 1956 seems to have been influenced by an apparent tendency to resolve doubt in favor of assuring federal court review of every conceivable objection to agency action. The tendency has on occasion served well the paramount public interest in the administration of justice, and has avoided a slamming of the federal courthouse door in the face of persons entitled to be there. Courts should be equally zealous in avoiding the unauthorized jamming of the courthouse door. Persons entitled to be there are harmed when denied or delayed entry by a crowd which is there not because a constitutional right is involved, or because a statute provides a right to be there, but only because a court had adopted an overly expansive view of its own jurisdiction.

In the present case, for example, it is nowhere asserted that Congress has ever specifically granted jurisdiction to any court to hear appeals from administrative decisions on claims for annuity by those who voluntarily retire. Whatever may be their "traditional powers", all federal courts are courts of limited jurisdiction. It is not within the powers, traditional or otherwise, of federal courts to fill every seeming jurisdictional void they may detect in congressional legislation; but if it were, there is no void detectable in § 8347(c) and (d).[2/]

2/ The powers of federal courts have been the subject of controversy since long before those courts were born. There

(continued)

The Administrative Procedure Act provides for judicial review of agency action, 5 U.S.C. § 704, but specifies that judicial review is not available when precluded by statute, 5 U.S.C. § 701(a). In Dismuke, 297 U.S. at 172, in Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967), and in Barlow v. Collins, 397 U.S. 159, 166-67 (1970) (quoting Abbott), the Supreme Court has erected a presumption of judicial review over agency action. It has, however, been careful in those cases to recognize the right of Congress, within constitutional boundaries, to rely on the administrative process and to preclude judicial review. As above indicated, we hold § 8347(c) an express preclusion of judicial review. Hence the presumption outlined in Abbott is inapplicable, and our holding here does not impinge upon or conflict with that presumption.

It is suggested that this court might reconcile the presumption of reviewability with the finality clause of § 8347(c) by noting the inclusion of OPM's fact finding role in

2/ (continued)

was deep distrust of a federal judicial system in the Constitutional Convention. See Farrand, The Records of the Federal Convention, (Rev. Ed. 1937); Prescott, Drafting the Federal Constitution, ch. 17 (1941). There was concern that the federal judiciary would find it had jurisdiction to achieve broad purposes of federal statutes. See 3 Elliott, Debates, 565. Early on, the Supreme Court held that inferior federal courts received no powers directly from the Constitution, but only such authority as may be vested in them by Congress, Turner v. Bank of North-America, 4 U.S. (4 Dall. 7) (1799); McIntire v. Wood, 11 U.S. (7 Cranch 503) (1813); Kendall v. United States, 37 U.S. (12 Pet. 524) (1838); Cary v. Curtis, 44 U.S. (3 How. 236) (1845), and that for jurisdiction to exist the Constitution must have given the capacity to take it and an act of Congress must have supplied it. The Mayor v. Cooper, 73 U.S. (6 Wall. 247) (1867).

that section, and by saying that Congress intended to preclude only a review of OPM's factual determinations. Then, we are asked to say, a claimant for a voluntary disability retirement annuity would retain a "right" to judicial review for a possible procedural or legal error by OPM or MSPB. We decline the suggestion. The question before us is not whether this or that type or breadth of judicial review would be in our lights advisable or appropriate. The question is whether any is authorized.

However attractive may have been the temptation to reconcile the reviewability presumption with § 8347(c) and (d) as they stood before the 1980 amendment, no such reconciliation is now possible. The current statute provides that OPM shall determine "questions" of disability and that its "decisions" concerning such matters are reviewable under § 8347(d)(1) only by MSPB. Thus Congress has provided, not precluded, review of OPM's factual determinations. It lodged that function, however, in MSPB. The statute further provides in § 8347(d)(2) for judicial review of particular MSPB decisions, under a particular standard of review found in § 7703. Congress having so divided and allocated the review function between the executive and judicial branches, the courts are not at liberty to reallocate it.

Moreover, the factual determination that a voluntary claimant is not disabled can be expected to control the outcome, as illustrated by the virtually universal denial of

relief, even in forced retirement cases, under the judicially crafted "Scroggins" type of review. Nor, the factual determinations being non-reviewable, is relief likely on legal or procedural grounds. As above indicated, one whose application for an annuity is denied after voluntary disability retirement is not by that denial alone deprived of a constitutional right. There being no liberty or fundamental pre-existing property interest at risk, the simplest procedures adopted by the agency will avoid a claim of denial of procedural due process.

It is, of course, possible to posit a scenario in which OPM and MSPB might both act so irresponsibly and arbitrarily as to employ unacceptable interpretations of law, statutes, or regulations, and totally inadequate procedures, for the purpose of denying annuities to those who voluntarily retire. Conjecture cannot alone, however, serve as a grant of jurisdiction. A facile formula based on a fear of faceless functionaries would be such a grant, for the court would have to exercise jurisdiction to determine whether legal or procedural error had occurred. Allegations of procedural error are easily made, as were the assertions here of failure to follow procedures inapplicable to Lindahl.

Whether the supposed scenario is realistic, and whether it be of a nature and breadth to warrant judicial review of all MSPB decisions on all voluntary retirement claims, would be a

matter for investigation and legislation (if deemed appropriate) by the Congress, not the courts.

(c) 5 U.S.C. § 7703 and 28 U.S.C. § 1295

Lindahl cites the broad provisions for review by this court of what he describes as "any" MSPB decision, and the grant of "exclusive" jurisdiction to this court over appeals from what he calls "all" MSPB decisions in 28 U.S.C. § 1295(a)(9). It is implied that a "conflict" or "anomaly" would somehow arise if, in the light of § 7703, it were held that §§ 8347(c) and (d) expressly preclude judicial review of voluntary disability retirement claims. We find no basis for that view.

First, retirement benefit claims are not adverse action claims. Fancher v. United States, supra, 588 F.2d at 807; Piccone v. United States, 407 F.2d 866, 872 (Ct. Cl. 1969). No voluntary disability claims have been reviewed under § 7703. Respecting involuntary claims, it was the Scroggins line of cases, not § 7703, which was looked to as a basis for jurisdiction.

Second, there is no "conflict" or "anomaly" created when Congress provides different routes and different forums for enforcement of different statutory rights. Indeed, Congress provided a divergent route in § 7703(b)(2) for a claim that an adverse action was based on discrimination. Thus an anomaly is avoided, not created, when the court honors the express exception to its § 7703 jurisdiction appearing in § 7703(b)(2)

and simultaneously honors the express exception to its § 7703 jurisdiction appearing in §§ 8347(c) and (d).

Third, there are numerous differences between an appeal from OPM's denial of a claim for annuity on voluntary retirement that may be brought to MSPB under §8347(d)(1), and appeals that may be brought to this court under § 7703. The former may be brought by "individuals"; involve "procedures prescribed" by MSPB; and place the burden on the applicant, Chavez v. OPM, 6 MSPB 343, 353 (1981). Those differences warrant, if warrant were needed, a difference in congressional treatment.

Fourth, a specific statute dealing with disability claims prevails over a general statute dealing with appeals generally from decisions of the MSPB. HCSC-Laundry v. U.S., 450 U.S. 1, 6 (1981).

Decisions of MSPB that can be challenged by a de novo trial in the district court (i.e., those resolving discrimination claims), and OPM decisions that Congress has specifically said are not reviewable except by MSPB (§§ 8347(c) and (d)(1)) are clearly not encompassed within the words "any" and "all" that were used by some congressmen in discussing the jurisdiction provisions in the FCIA. S. Rep. No. 95-969, 95th Cong., 2d Sess. 62, reprinted in 1978 U.S. Code Cong. & Ad. News 2784. It will not do to argue that references by some congressmen to review of "all" MSPB decisions by this court resulted in a repeal, sub-silentio, of §§ 7703(b)(2) and

8347(c). Repeal of a statute should never be assumed. Allen v. McCurry, 449 U.S. 90, 99 (1980).

Quite apart from the presence of §§ 7703(b)(2) and 8347(c) and (d), it is not true that Congress made "all" MSPB decisions appealable to this court. In 28 U.S.C. § 1295(a)(9), Congress provided this court with a jurisdiction over MSPB decisions different from that previously provided the Court of Claims and the regional Circuit Courts of Appeals. As discussed in Lancellotti v. OPM, supra, 704 F.2d at 97-99, those courts had been stated to have jurisdiction over "all final orders of the Merit Systems Protection Board" except those in § 7702(b)(2) cases. 28 U.S.C. § 2342(6) (Supp. IV 1980). In contrast, the FCIA makes the jurisdiction of this court applicable to appeals "pursuant to sections 7703(b)(1) and 7703(d) of title 5". Appeals of MSPB decisions under 5 U.S.C. § 1207 are directed to the regional circuits, not to this court. There is no appeal, even to the MSPB, under 5 U.S.C. § 3592.

As complicated and complex as the Civil Service Reform Act is, it is at least clear, when §§ 7703(b)(1) and 7703(d) are read in context, that among the final orders and decisions of the MSPB appealable to this court are those under § 7703(a)(1). Section 7703(a)(1), as applicable to this court, encompasses MSPB original jurisdiction cases and appeals properly brought to the MSPB under § 7701. Section 7701 itself encompasses agency decisions either specifically designated by the statute as appealable to MSPB under § 7701, e.g., 5 U.S.C.

§§ 3593(c)(2); 3595(c); 7543(d); and 8347(d)(2); or those so designated by "rule or regulation".

The provision governing MSPB's jurisdiction, 5 U.S.C. § 7701, raises no conflict with our adherence to the statutory preclusion of judicial review present in §§ 8347(c) and (d). In connection with appeals to MSPB like Lindahl's, MSPB has by regulation elected to employ § 7701 procedures. See 5 CFR § 1201.3(a)(6). The question of whether MSPB correctly employs § 7701 procedures in exercising its review authority of particular agency decisions under § 8347(d)(1), however, is not before us. An MSPB election to treat its review authority under § 8347(d)(1) as permitting use of § 7701 procedures cannot constitute a grant of jurisdiction to this court to review all decisions MSPB reaches under § 8347(d)(1). Schwartz v. Department of Transportation, No. 83-768 (Fed. Cir. Aug. 23, 1983). Nor can that election work a repeal of § 8347(c). Nor is there reason to suppose that MSPB authority to render decisions and this court's jurisdiction to review MSPB decisions must be identical or coextensive.

To hold that judicial review of all § 8347(d)(1) decisions had all along been available under § 7703, would be to render superfluous Congress' action in § 8347(d)(2), making judicial review available for particular claims under § 7703.

We need not, and hence do not, decide in this case whether all decisions of MSPB under § 8347(d)(1) are denied

judicial review by § 8347(c). If § 8347(c) is to have any meaning, there must be some decisions of OPM that are final and conclusive and not reviewable except by MSPB under § 8347(d)(1). It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this court.

(d) The 1980 Amendment

It is suggested that Congress knew of Scroggins at the time of the 1980 amendment, and that it effectively ratified judicial review under the limited "Scroggins formula", because it did not specifically say it was not doing so. We are cited to statements of congressmen mentioning Scroggins, H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. 3 (1980), and to contrary statements of other congressmen who thought that all judicial review was precluded by § 8347(c). S. Rep. No. 96-1004, 96th Cong., 2d Sess. 2, reprinted in 1980 U.S. Code Cong. & Ad. News 5986, 5987; H.R. Rep. No. 96-1080, supra, at 4. Though OPM's director could not express the intent of Congress, we are cited to a letter from him in which he acknowledged existence of the review referred to in Scroggins. H.R. Rep. No. 96-1080, supra, at 8-10. The legislative history contains no statement of the "formula", no recognition that the "formula" had been mentioned in forced retirement cases, and no express acknowledgement that the "formula" had resulted in virtually no reversals of the decisions reached in the administrative process.

We find no support for the view that the 1980 amendment merely expanded the "breadth" of review, in cases of forced retirement on mental condition, beyond the "limited" review said to be available for such cases in Scroggins. If that were true, it would, as above indicated, merely remove the viability of Scroggins. It would not establish that a judicially created and judically limited review had existed for other types of cases, such as the voluntary retirement type presented here. What did not properly exist cannot be expanded.

It is one thing to say on a particular record that Congress had incorporated the judicial "gloss" placed on a statute. It is another to say that a court's departure from an express preclusion of review is adopted unless Congress in reenacting the preclusion verbatim specifically adds "we meant what we said the first time". Whether a court may require Congress to specifically disallow review the court had "allowed" is not here a relevant consideration. In § 8347(d)(2) Congress not only allowed but legitimized judicial review in the type of case in which our predecessor court had said it was appropriate, while simultaneously reenacting the express review preclusion in § 8347(c) and making plain that §§ 8347(d)(1) and (d)(2) were exceptions to that preclusion.

That some congressmen and the director of OPM referred to the existence of a court-designed review formula, or that some congressmen said the law was not being changed, or that some criticized Scroggins, or that some said § 8347(c) barred

all judicial review, cannot be controlling. We look not to conflicting comments of a few congressmen, but to what Congress did. What it did in 1980, as above indicated, was to add an exception to its prohibition of review in disability cases, and allowed judicial review when the government orders retirement for mental disability. What it did was to leave § 8347(c) and its finality clause untouched. The "law" that Congress did not change in 1980 was the law Congress enacted in § 8347(c) and never repealed.

CONCLUSION

A Congress frequently criticized for vastly increasing the jurisdiction of the federal courts, with insufficient concern for the impact of its legislation on those institutions, has enacted an employee retirement scheme which relies on the administrative process, and in 5 U.S.C. § 8347(c) and (d)(1) excludes the courts from review of administrative decisions in at least those cases involving voluntary claims for disability annuities. That effective congressional solicitude for crowded court dockets, and for the effect of that crowding on deserving litigants, deprives no one of any constitutional or statutory right.

The statute, 5 U.S.C. § 8347(c) and (d), is clear and unambiguous. Whether the finality clause of § 8347(c) should have been from the outset honored by judicial recognition that

jurisdiction was lacking is academic. Today this court applies to the case before it the statute as written.

ORDER

It is ordered that respondent's motion to dismiss for lack of jurisdiction be and it is hereby granted.

DISMISSED

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL, Petitioner,	)	
v.	)	Appeal No. 39-81
OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	

NICHOLS, Circuit Judge, concurring.

I agree with the judgment and join in it. Chief Judge Markey's able opinion I join in except where it is inconsistent with what follows.

First, I believe it is ill-advised to limit our holding to applicants for disability annuity who have themselves voluntarily retired from active employment because of disability. (a) The statutory preclusion of judicial review, relied on by the court, 5 U.S.C. § 8347(c), itself draws no such distinction, except in the category, not here involved, of involuntary retirement for mental disability. For this court to draw one belies our own conclusion that preclusion statutes mean what they say. (b) The distinction we draw will have unfortunate consequences in that persons of marginal disability will hang in and insist on involuntary retirement so as to safeguard their annuity rights, to the detriment of the federal service, and (c) the factual basis of the statement that Mr. Lindahl is a voluntary retiree is uncertain. It is clear he

did not want to be retired except on the condition that he receive the annuity. That is why we have this lawsuit. If he put in an application for retirement that failed to make clear the precondition he had in mind, that may be dispositive of the present case, but only because nobody focused on the voluntary nature of the retirement, as an issue, and nobody took the trouble to clarify the record. Who said what to whom on what date is quite obscure. Nor is it clear whether Mr. Lindahl was adequately warned that by applying as he did, he sacrificed his active duty pay without obtaining assurance as to disability annuity. I would prefer to assume in favor of Mr. Lindahl that the retirement was involuntary except insofar as he agreed with management that he was in fact disabled, and differentiate the case to that extent only from those in which the much discussed "Scroggins formula" was invented and applied.

The chickens will come home to roost in a whole series of cases in which it will be alleged that the "Scroggins formula" survives and has an area for application, despite the Lindahl decision, because the disability retirement was de jure involuntary, or actually involuntary in view of the course of discussion of the applicant's physical problems, between him and management.

Second, having noticed and acknowledged that decisions of other circuits are in conflict as to whether the

"Scroggins formula" undercuts the finality or preclusion language of § 8347(c), the court moves along without stating why the decisions applying the preclusion are prefrred over those applying the formula. Though we are now to be, under the Supreme Court, the paramount authority to decide the issue under the Federal Courts Improvement Act of 1982, and none of these decisions bind us, they were rendered by courts having jurisdiction at the time, courts of last recourse as of right. None of the decisions, probably were products of such agonizing introspection as ours will be. None were rendered in banc. It is usual, however, for courts, federal and other, raised under our common law traditions, to regard decisions by other courts of equal authority as part of the problem to be dealt with, to be followed or explained away. I do not think the fact they are in conflict with each other is the only thing about them one need notice. There is a somewhat wooden quality about most of them. Those adhering to the formula adhere also to the often expressed judicial horror of leaving any executive branch decision immune to judicial review, without notice of the fact that this horror is much mitigated when it is a question of a money claim against the United States, as an annuity claim is, even apart from statutory preclusions. United States v. Testan, 424 U.S. 392 (1976). Those adhering to the preclusion likewise fail to notice how far the horror has often

carried other courts, despite other express and implied statutory preclusions. The proper technique of weighing this horror against a statutory preclusion is a subject nobody seems willing to discuss, and perhaps wisely. I come out with the unsurprising conclusion that the decisions I agree with as to result are better considered, and I have at least one articulable reason for this which I will state infra.

A third and more serious objection I have to our generally able decision, is that it too ignores the striking contrast the "Scroggins formula" presents to the techniques of our highest court, and other courts, in dealing with "finality language" in other statutory contexts, and alleged to bar or curtail the judicial review that would otherwise occur.

The World War II Renegotiation Acts, 50 U.S.C. app. § 1191 and ff, both contained, originally or as amended, provisions (subsection (e) of § 1191) that a party aggrieved by an order to eliminate excessive profits could file a petition with the Tax Court:

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency.

In Lichter v. United States, 334 U.S. 742 (1947), the Supreme Court, though viewing the Tax Court as an adminis-

trative agency, upheld the constitutionality of these arrangements as a war measure under the constitutional war power. In United States v. California Eastern Line, Inc., 348 U.S. 351 (1955), the Court gave the finality language a literal interpretation, holding it did not extend to questions as to what contracts were renegotiable, even though this necessarily underlay the issue of "amount."

The Renegotiation Act of March 23, 1951, 50 U.S.C. app. § 1211 and ff, set up a scheme that was similar so far as concerned the role of the Tax Court, and in § 1218 had a similar finality clause. That Act was extended several times regardless of whether the Lichter grounds existed, i.e., a state of all-out or total war. The circuits that considered the question refused to hold that any exception existed to the finality language, except review on "constitutional or jurisdictional grounds." Consolidated-Hammer Dry Plate & Film Co. v. Renegotiation Board, 375 F.2d 591 (7th Cir. 1967); Boeing Company v. Renegotiation Board, 325 F.2d 885 (9th Cir.), cert. denied, 377 U.S. 923 (1963). The rule then was that "amount" determinations, whether they related to fact or law, were reviewable only on "constitutional or jurisdictional" grounds. Whatever that was held not an "amount" determination was reviewable the same as any Tax Court decision by a court of appeals, when it concerned a federal tax.

The Seventh Circuit, in its case, considered whether some "amount" holdings were "so arbitrary and capricious as to raise a constitutional issue" and stated they were not, but also said that its review of them was gratuitous. (375 F.2d at 594.)

All this is ancient history as the last extension of the Renegotiation Act has long since expired, but it does throw some light on the technique of applying finality clauses.

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876, provides that court-martial sentences, after proper review by military tribunals are "final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all * * * courts * * * of the United States * * *." In Schlesinger v. Councilman, 420 U.S. 738 (1975), it is held that this did not necessarily bar an Article III court from intervening by way of habeas corpus, injunction, or back pay suit in case of an unconstitutional or otherwise void court-martial. United States v. Augenblick, 393 U.S. 348 (1969) previously had reversed two decisions of the former Court of Claims that had sustained collateral attacks on court-martials by way of back pay suits, but paid insufficient respect to the finality language. It seems fair to say the distinguished record of the Court of Claims may have displayed such in-

sufficient respect, not alone in enunciating the "Scroggins formula."

United States v. Wunderlich, 342 U.S. 98 (1951) reports an earlier losing encounter by the former Court of Claims with finality language. In that case the issue was the respect to be given to language then standard in government contracts, making decisions of contracting officers final in all cases of disputes with contractors, whether on issues of fact or of law. The Court of Claims by long and generally accepted practice had read into this language an implied exception for decisions "so grossly erroneous as to imply bad faith," e.g., Levering & Garrigues Co. v. United States, 71 Ct. Cl. 739 (1931). The Supreme Court, in a decision that caused many tremors, held that the only permissible exception was actual fraud. Congress, by statute, reinstated the previous rule. 41 U.S.C. § 321, 322. See history of this issue in Hoel-Steffen Construction Co. v. United States, 684 F.2d 843 (Ct. Cl. 1982) in which it is pointed out that there is necessarily a great difference between contract and statutory finality of decision, the former not affecting the waiver of sovereign immunity and consent to be sued as the latter often does.

Allowance of disability annuities to war veterans is a case decidedly parallel to the civilian annuities we have to deal with here.

The finality language in 38 U.S.C. § 211 bars judicial review of Veteran Administration decisions concerning veterans' benefits. It is not the same as § 8347(c) inasmuch as it is not limited to issues of disability and dependency and court review is expressly referred to. For whatever the point is worth, it may be noted that the Court of Claims never even in dictum pronounced any "Scroggins formula" type of exception to finality and the complete exclusion of the court from the area is rather assumed than asserted. Cases are, e.g., Martin v. United States, 197 Ct. Cl. 1062 (1972); Jennings v. United States, 214 Ct. Cl. 789 (1977); Jump v. United States, 164 Ct.Cl. 453 (1964). In Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), aff'd, 51 U.S.L.W. 4999 (June 27, 1983), the Court of Claims appears to recognize in dictum at 268 that this finality language provides "against any judicial scrutiny at all."

The Supreme Court in Johnson v. Robinson, 415 U.S. 361 (1974), held that § 211 did not bar judicial consideration as to the constitutional validity of provisions of the laws providing veterans' benefits, a conclusion based on the bare language of § 211 as well as its purposes as shown by legislative history. The decision is not therefore a matter of reading unstated exceptions into the finality language itself. Justice Brennan's care in framing the majority opinion so as not to do this is noteworthy.

The Supreme Court handed down in United States v. Erika, Inc., 456 U.S. 201 (1982) a decision which has a powerful impact upon the matter at hand. It deals with Medicare reimbursement to health care providers. These are in two kinds, Medicare A and B. Medicare A is primarily for hospital care and hospitals are paid by the government through an intermediary. Medicare B is optional for beneficiaries, is primarily for doctors' fees and other nonhospital health care expenses. Annuitants who elect the coverage pay a small amount which entitles them to be reimbursed by the government for payments which they make direct to the providers, or they may assign their claims to providers who collect from the government as assignees. Judicial review in the district courts only under Medicare A is expressly allowed, in cases of dispute as to the compensation allowable to providers. Distinctions are made as to the extent of administrative review as to issues of eligibility, and quantum under B. Congress is shown by the legislative history to have omitted Medicare B claims from judicial review because it expected most of them to be too small to take the time of the courts, overlooking that a concern such as Erika might be assignee of hundreds of claims and thus have large sums at stake. If Congress had said nothing about review, Erika and all other providers could have sued in the Court of

Claims under the Tucker Act, 28 U.S.C. § 1491. The Supreme Court held, however, that the fashioning of judicial remedies for the A cases with nonjudicial review in the B cases, implies an intent that this is to be all. Such an implication is drawn from the bare text even before it is confirmed by the legislative history, showing the reason for the difference as stated above.

Thus there can be implied preclusions of judicial review where the finality of the administrative decision is made just as absolute as when the preclusion is express. The reversed decision below, Erika, Inc. v. United States, 634 F.2d 580, 587 (Ct. Cl. 1980), undertook to use the "Scroggins formula," urging in support of its position that the "formula" cases, several of which it cited, showed that even an express preclusion allowed its exceptions though unrecognized in the statute itself; still more then would this be true of a merely implied preclusion. In Erika the Supreme Court teaches that express and implied preclusions are equally effective.

Congress has stated the same view. 5 U.S.C. § 702, Pub. L. No. 94-574, Act of October 21, 1976, is a broad waiver of sovereign immunity and consent to be sued in the federal courts in cases "seeking relief other than money damages." It provides that it does not "affect other limitations on judicial review" or confer "authority to grant

relief if any other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." The legislative history, H. Rep. No. 94-1656, 5 U.S. Code Cong. & Adm. News, 94th Cong. 2d Sess. 1976, shows that Congress considers a statute impliedly precludes judicial review if it contains any "implied preclusions" and description of one method of review impliedly precludes other methods. By this reasoning, the provision in § 8347(d) for judicial review of involuntary disability retirements for mental condition would preclude judicial review of other disability retirement decisions even without the finality language in § 8347(c). Congress has put two locks on the door.

The circuit court decision adopting the "Scroggins formula" in their decisions, relied on by the dissent herewith, in my view reveal how ill considered they are by their failure to deal with Erika. The OPM rightly relies on Erika as the strongest kind of Supreme Court support for its motion, citing it five times in its initial brief. Yet our majority opinion ignores Erika for reasons unfathomable by me.

In Erika we have the same court that first employed the "Scroggins formula" to undercut statutory finality, or express preclusion of judicial review, then for the first time after many years, proposing to extend the formula to

another statutory preclusion, this time an implied one. At least I suppose that was the intent, though this was not expressly stated. The Supreme Court shoots this aircraft down in flames. If the formula still stands in the area of disability retirement, it stands as an odd anomaly which may not be, and never has been, extended to parallel situations. The law normally dislikes oddities of that kind, but seeks to regularize and harmonize. One is reminded of the rule once enforced by Chief Justice Rugg upon the Massachusetts Supreme Judicial Court that it was never to overrule a decision of its own that on later reflection it perceived to be erroneous. It was only to restrict the disfavored precedent "to its own peculiar facts," a signal to the bar never to cite the case again.

The technique of applying a statutory preclusion of judicial review is not, however, the simple open-and-shut or black-and-white issue it is perceived to be in the able majority opinion. As stated by Justice Brandeis years ago, Lynch v. United States, 292 U.S. 571, 586 (1934), a statute denying a constitutional right will not be read as a preclusion to save its constitutionality, but will only be so read if the language of Congress is unequivocal and no other interpretation is possible. This will rarely occur. The apparently flat and sweeping preclusion of § 876 of the Uniform Code of Military Justice is read in

Schlesinger v. Councilman, supra, as allowing all sorts of collateral attacks in civilian courts if an alleged constitutional violation is grave enough or if the court-martial decision is simply void. (As to what is or was a void court-martial see II Court of Claims History (1978) at 49.) This result is much aided by the legislative history showing that the language was never expected to be a barrier to habeas corpus in appropriate cases. In Johnson v. Robinson, supra, recourse is had to legislative history material to show that, despite sweeping language, preclusion of inquiry by a court as to the constitutionality of a statutory provision affecting veterans' rights was not intended.

United States v. California Eastern Line, Inc., supra, shows a technique of literal construction of a statutory preclusion to save judicial review. Thus a preclusion of review as to "amount" of excessive profits determined in renegotiation is held not to preclude review as to what contracts are renegotiable, though the answer will govern "amount." In Polos v. United States, 621 F.2d 385, 391-92 (Ct. Cl. 1980), the suggestion is made or implied that the decisions as to disability and dependency, given finality by § 8347(c), are decisions as to questions of fact, whereas the questions saved for judicial review by the "Scroggins formula" are questions of law. The idea is

spelled out more expressly in Lancellotti v. OPM, 704 F.2d 91 (3d Cir. 1983). That case identifies a situation where "disability" vel non depends on the answer to a legal question: construction of a statutory provision for termination of status as a disability annuitant upon one's reaching a specified level of income from wages or self-employment.

This kind of reasoning certainly echoes that found in the Supreme Court precedents in their technique of construing statutory finality clauses. However, I do not think it is valid here because it deals with only one of what I have called double locks: the express preclusion but not the implied one. The interpretation of the decisions given finality in § 8347(c) as those establishing facts only is possible but not required by the language of § 8347(c) standing alone, and is contradicted by the implied preclusion in § 8347(d), with the cross-reference from (c) to (d) added in 1980.

Mr Lindahl's principal complaint of the MSPB decision is that it misallocated the burden of proof which he says should have been placed on the OPM, not on him. He next says it was a violation of "due process" to discharge him while his application to the OPM for disability retirement was pending undecided. This appears to be actually a complaint of failure to follow a governing regulation.

Thirdly, he says the decision of the MSPB that he was not disabled is unsupported by substantial evidence. The first two issues would arguably be saved from dismissal by the "Scroggins formula" which he invokes, but not if it is repudiated as a rule of decision in this court, as I favor. The third issue is not possibly saved for him even by the "Scroggins formula" since that formula does not provide for substantial evidence review. The dissent therefore should concede dismissal of that issue, to be consistent with the formula.

In summary, my conclusion is that preclusion of judicial review is never absolute in life, but at the Supreme Court level review has never been practiced in defiance of preclusions as much as the "Scroggins formula" would require. The formula is at best a peculiar anomaly invoked in but one class of case. Virtually it is an invitation to counsel to litigate any issue of statutory construction or interpretation of a regulation. As the Chief Judge writes, it was born of a judicial reluctance to be wholly bound from review of involuntary disability retirement cases where a desk official was given unregulated and unrestricted power to brand a resisting civil servant as mentally disabled. This situation is fully taken care of in § 8347(d)(2) and all other disability retirement rulings under § 8347(c) are at any rate subject to independent due process review by a quasi-judicial body that

seems as well suited to perform the task, as the Tax Court was for renegotiations. Now the "Scroggins formula" remains to clutter and confuse the law in cases for which it was not devised, one that invites litigation in an area where Congress wished it not to be. We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective.

I would grant the motion as to all issues briefed for review by Mr. Lindahl.

WAYNE LINDAHL,
Petitioner,
v.
OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

Appeal No. 39-81.

NIES, Circuit Judge, concurring.

I join in the opinion of the majority but I do so, in part, because of the issues raised by Lindahl's petition for review which are not discussed in the other opinions. Lindahl seeks judicial review essentially of two issues: (1) the fact of his disability and (2) the failure of the MSPB to impose the burden of proof on OPM as required by 5 U.S.C. § 7701(c). The "question of disability" is clearly precluded by 5 U.S.C. § 8347(c) from judicial review. I do not agree, if the majority so holds, that all aspects of a disability claim are precluded from judicial review, although the claimant would have to seek relief through a different forum since our appellate review is limited to involuntary mental disability cases.

The second argument merely illustrates the error of the MSPB in attempting to force all disability claims into § 7701. MSPB admittedly does not follow § 7701 in a case such as this one. However, a statutorily imposed burden of proof cannot be conveniently ignored.

Since the thrust of appellant's petition is to obtain judicial review of the fact of his disability, I would not transfer the case to the United States Claims Court, as appellant asks. Judicial review of that question is precluded.

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Appeal No. 39-81

DAVIS, Circuit Judge, with whom FRIEDMAN, KASHIWA AND SMITH, Circuit Judges, join, dissenting.

In my view the 1980 amendment of 5 U.S.C. § 8347 did not lessen or abolish the very narrow judicial review that has been accorded to disability retirement matters at least since 1956.[1/] The legislative objective, rather, was to expand judicial review in the special area of involuntary mental-disability-retirement. I join, therefore, with the several courts of appeals that have come to the same conclusion. Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982); McCard v. United States, 702 F.2d 978 (11th Cir. 1983); Turner v. OPM, (D.C. Cir., May 17, 1983); Pitzak v. Office of Personnel Management, No.

1/ See Elmore v. Bruckner, 236 F.2d 734, 736-37 (D.C. Cir.), cert. denied, 352 U.S. 555 (1956); Murphy v. Wilson, 236 F.2d 737 (D.C. Cir. 1956); Smith v. Dulles, 236 F.2d 739, 740, 742 (D.C. Cir.), cert. denied, 352 U.S. 955 (1956); Gaines v. United States, 158 Ct. Cl. 497, 502, cert. denied, 371 U.S. 936 (1962); Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968); McGlasson v. United States, 397 F.2d 303, 307 (Ct. Cl. 1968); McFarland v. United States, 517 F.2d 938, 942-3 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); Allen v. United States, 571 F.2d 1411 (Ct. Cl. 1978); Pancher v. United States, 588 F.2d 803, 806 (Ct. Cl. 1978); Polos v. United States, 621 F.2d 385, 391-2 (Ct. Cl. 1980).

82-1592, (10th Cir., July 14, 1983); see also Lancellotti v. OPM, 704 F.2d 91 (3rd Cir. 1983).[2/] Because of these recent opinions, which cover the ground, I shorten my statement.

The core of it is that (a) the standard of narrow judicial review had been utilized for many years when Congress considered the 1980 amendment;[3/] (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of that Congressional consideration was the over-narrowness of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed, the then Director of OPM expressly told Congress that the prior standard would continue for non-mental disability cases, see Turner v. OPM, supra, slip op. at 9-10); (e) there is nothing in the Committee reports or the floor discussion suggesting that the prior judicial standard was no longer to be followed in the non-mental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).

2/ In Campbell v. OPM, 694 F.2d 302 (1983), the Third Circuit seemed to view the 1980 amendment as abolishing all judicial review in non-mental disability retirement cases, but the later ruling in Lancellotti appears to have qualified Campbell by according judicial review to legal rulings bearing on disability retirement pay. 704 F.2d at 96-98.

3/ This standard is often called "Scroggins-type" review but it actually goes back about a dozen years before Scroggins was decided. See supra note 1.

In the face of that history, it is hard for me to think that, in explicitly expanding review for mental cases, Congress silently withdrew for non-mental cases the limited judicial review that had long been allowed. To paraphrase what the Supreme Court said in Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 381-2 (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another federal statute had incorporated a prior judicial gloss): "it is abundantly clear" that the Scroggins standard "was a part of the 'contemporary legal context' in which Congress legislated" in 1980. "In that context, the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the Scroggins standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, that language carried with it the existing judicial interpretation.

By the same token it is improper to decide now (as the majority intimates should be done) that the Scroggins reading was incorrect when first adopted in 1956 (and since followed) and should be jettisoned regardless of Congress' position in 1980. Because Congress "affirmatively intended [in 1980] to preserve" that standard we cannot and should not now rule to the contrary.

For these reasons,[4/] the motion to dismiss should be denied and petitioner accorded the right to have his claim tested under the so-called Scroggins standard.

4/ These reasons apply a fortiori to the amendment made by the Civil Service Reform Act of 1978, as to which there is not the slightest indication of any purpose to change the then-existing standard of review.

United States Court of Appeals for the Federal Circuit

WAYNE LINDAHL, Petitioner,	)	
v.	)	Appeal No. 39-81
OFFICE OF PERSONNEL MANAGEMENT, Respondent.	)	

SMITH, Circuit Judge, with whom FRIEDMAN, DAVIS, and KASHIWA, Circuit Judges, join, dissenting.

I fully join Judge Davis' dissent, but I write separately because I believe it particularly important, at the threshold of this court's existence, to consider the overall statutory structure of the civil service provisions as they relate to this court's appellate jurisdiction. I am especially mindful that, under the Federal Courts Improvement Act of 1982, this court is now the only circuit-level forum for petitioners seeking judicial review of most agency actions under the civil service laws. With the majority's result, I fear, we have adopted an unnecessarily cautious and restrictive approach to our nation-wide jurisdiction in this area.

I.

The comprehensive appellate framework established over the considerable period of time between enactment of the

Civil Service Reform Act of 1978 and the Federal Courts Improvement Act of 1982 -- and constructed by more than one Congress -- does not present a model of clarity or singularity of purpose. Specifically, the statutory interrelationships are significantly preordained depending upon the section of the code through which one enters in search of the various paths of appeal through this maze. The majority has entered the maze through a portal which mandates a dead end; it errs by failing properly to consider and weigh the merits of the other paths.

A.

Beginning at section 7703(a)(1),[1/] which is the jurisdictional provision for the Federal Circuit in the Civil Service Reform Act, this court has exclusive jurisdiction (see 28 U.S.C. § 1295(a)(9)) over "a final order or decision of the Merit Systems Protection Board" (emphasis supplied). An express exception to this inclusive jurisdiction is for discrimination cases, in section 7703(b)(2). Possible or partial exceptions may also be found in the civil service provisions dealing with review of Special Counsel cases[2/] and Senior Executive Service remov-

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1/ All section references are to title 5, U.S.C., except where otherwise indicated.

2/ Sections 1206 and 1207 concern Special Counsel investigations or prohibited personnel practices and hearings

ases.[3] Furthermore, section 7703(d) provides that the director of the Office of Personnel Management (OPM) may petition for review of "any final order or decision of the Board" (emphasis supplied) and that the Federal Circuit may hear any such case.[4]

2/ (Cont'd)

and decisions thereon. Section 1206(c) gives the Special Counsel authority to request the MSPB to take action on a prohibited personnel action; § 1206(g) requires the Special Counsel, if it determines that disciplinary action should be taken against an employee, to proceed according to § 1207; § 1206(h) authorizes the Special Counsel to seek corrective action before the MSPB for a pattern of prohibited personnel practices not otherwise appealable to the MSPB under § 7701; and § 1207(c) provides an employee subject to disciplinary action under § 1206(g) with the right to obtain judicial review of a final order of the MSPB in the appropriate regional circuit. I do not attempt to sort out here to which circuit court (this court or regional circuits) appeals for various types of Special Counsel cases go. Suffice it to say, however, that the matter is more complex than the majority, citing § 1207 only, has suggested.

3/ Section 3592, concerning removal from the Senior Executive Service, allows a career appointee to request, in certain circumstances, an informal hearing before an official appointed by the MSPB, but denies that appointee the right to initiate an action with the MSPB under § 7701. The majority summarily concludes from this provision that the career appointee has neither MSPB nor court appeal rights in these circumstances. While this may be correct (i.e., there may not be "a final order" of the MSPB), I am not prepared to so quickly hold without proper examination of congressional intent and the structure of this provision. (For example, §§ 3593 and 3595 authorize career appointees to appeal certain Senior Executive Service reinstatement or reduction-in-force actions under § 7701 to the MSPB.)

4/ It seems clear that "a" in § 7703(a)(1) means "any," and so would achieve parallelism with subsection (d)(1). Such interpretation, however, is not necessary to my views.

Section 7703(a)(2) also has implications for the jurisdiction of the MSPB and this court. It differentiates between the procedures to be followed in review of final orders or decisions "issued by the Board under section 7701" and those to be followed in review of other MSPB decisions. See Phillips v. USPS, 695 F.2d 1389, 1390 n.2 (Fed. Cir. 1982). Thus the MSPB has not one but a plurality of jurisdictional bases for its actions, and it is important to see what each is.

Section 7701(a) is clearly the main basis -- it covers in essence all appealable agency adverse actions -- and we have held that our jurisdiction of section 7701(a) actions is "plenary." Rosano v. Department of the Navy, 699 F.2d 1315, 1317 (Fed. Cir. 1983). Section 7701(a) is expressly made the jurisdictional basis for actions under sections 4303(e) (actions based on unacceptable performance), 7513(d) (adverse actions taken to promote the efficiency of the service), 7121(e) (grievance procedures), 7543(d) (actions against senior executives), and 3593 and 3595 (reinstatement or reduction in force in the Senior Executive Service). Section 5335(c) (withholding of periodic step increase), though it mentions no jurisdictional basis, has been held to be appealable under section 7701. Meyer v. Department of Health & Human Services, 666 F.2d 540, 544-45 (Ct. Cl. 1981). Likewise, many actions made appealable to the MSPB by OPM regulation (see section 7701(a), 5 C.F.R.

§ 1201.3(a)(8)) would be appealed under section 7701, though the regulations do not specifically mention it. See, e.g., 5 C.F.R. § 351.901 (reduction in force); 5 C.F.R. § 300.104(a) (employment practices). Finally, section 8347(d)(2) (OPM mental disability) determinations are expressly reviewed under section 7701(a).

Non-7701(a) cases would include, first, section 7702 (discrimination) cases which do not come to the Federal Circuit at all. Secondly, section 8347(d)(1) (OPM physical disability) determinations are also heard by the MSPB, but are either reviewed, as I see it, under Scroggins standards, i.e., a lower standard than for section 7701, or, as the majority sees it, not at all, i.e., a much lower standard than 7701. Thirdly, those non-7701(a) cases referred to in section 7703(a)(2), then, must include actions pursuant to sections 1206(c) and (h) (special counsel actions) and possibly 3592 (removal from the Senior Executive Service).[2/] Finally, MSPB decisions regarding award of attorney's fees under section 7701(g)(1) do not originate in an agency but are nevertheless reviewable by this court. See, e.g., Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983).

To sum up, if one starts with section 7703(a)(1), one finds that this court has jurisdiction of all MSPB deci-

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2/ See notes 2 and 3, supra.

sions except discrimination cases and possibly certain Special Counsel and Senior Executive Service cases. MSPB decisions fall into five categories -- section 7701(a), non-7701(a) (i.e., those indicated by section 7703(a)(2)), physical disability determinations, attorney's fees awards, and discrimination -- each of which categories has a different (or no) standard of review in this court.

B.

Starting instead at section 7701(a), the provision for MSPB jurisdiction, one immediately notes that its language is as broad as (or broader than) the provision for Federal Circuit jurisdiction in section 7703(a)(1). The MSPB has jurisdiction of "any action which is appealable to the Board under any law, rule, or regulation" (emphasis supplied). Based on this plain language, the MSPB has taken the position that 7701 is an umbrella provision, encompassing all substantive rights to appeal. In other words, all non-discrimination claims are funneled through section 7701 review by the board and thence to the Federal Circuit.

It is tempting to accept this view, for, since we have held that our section 7701(a) review authority is "plenary" (Rosano), this view would obviate the need for these many pages attempting to unravel the jurisdictional knot before us. I agree with the majority, however, that careful statutory construction cannot bring us to such an elegant con-

clusion. For example, if all review were either under section 7701 or 7702, then section 7703(a)(2) would be meaningless in suggesting non-7701 appeals to the Federal Circuit. Sections 1206, 1207, 3592, and 8347(d)(1), which expressly or apparently provide independent appeal routes to the MSPB, would be overridden.

C.

As to another alternate route, if one begins at section 8347, as the majority does, it seems immediately apparent that section 7701 does not apply to section 8347(d)(1) (physical disability) actions. Legislative history aside, the structure of subsections (c) and (d) makes it plain that a difference in treatment is intended between paragraphs (1) and (2): that MSPB reviews mental disability ((d)(2)) under 7701, while it reviews physical disability ((d)(1)) under (d)(1) itself, with procedures prescribed by the MSPB. There is therefore a conflict here with the plain language of section 7701(a), which covers "any action * * * appealable to the Board under any law." (Emphasis added.)

Moreover, as the majority discusses, the statute provides that mental disability ((d)(2)) cases are not only to be reviewed by the MSPB under section 7701 but also "shall be subject to judicial review under section 7703." Since this language is absent from the physical disability

(d)(1) provision, the majority not unreasonably concludes that Congress meant to deny section 7703 judicial review to (d)(1) physical disability cases. The majority finds conclusive statutory support for this view in the section 8347(c) "finality clause."6/

Viewed in isolation, then, section 8347 would suggest an appellate structure different from that suggested either by the MSPB or Federal Circuit provisions. Yet, even if one did not question the wisdom of determining overall appellate structure from a small part of the whole rather than from one of the broader appellate provisions, the conflict remains.

II.

As the foregoing demonstrates, under the civil service laws the appellate structure can be a relative thing. By concentrating on section 8347, the majority has not eliminated or avoided anomaly but has fallen victim to this relativism and implicitly created an anomalous system which, even if it is the best one (which I do not believe), fails to account for the difficulties it engenders.

The most significant anomaly, to my mind, is the con-

6/ So persuasive is the so-called "finality clause" in the majority's view, however, that it proceeds to the next and, to my mind, wholly unnecessary step of abolishing even the long-standing Scroggins review. I respectfully part company with the majority at this point.

flict between the majority's holding of no review and the plenary authority of the Federal Circuit to review as set out in section 7703(a)(1). Section 7703 contains broad and inclusive language. The Senate Report on the Civil Service Reform Act states that this section "applies to judicial review of all final orders or decisions of the Board * * *." S. REP. NO. 969, 95th Cong., 2d Sess. 62, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2723, 2784 (emphasis supplied). Under the Federal Courts Improvement Act, the entire jurisdiction created by section 7703 devolved upon this court. H.R. REP. NO. 312 at 18 ("jurisdiction * * * over all appeals from the Merit Systems Protection Board" (emphasis supplied)); S. REP. NO. 295, 97th Cong., 2d Sess. 21, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11, 31 ("jurisdiction of any appeal from a final order or final decision of the Merit Systems Protection Board" (emphasis supplied)). There is absolutely no reason to believe -- and numerous reasons to doubt -- that Congress intended this court to approach its MSPB jurisdiction with the extreme caution practiced by the majority.

A more particular anomaly is created by the majority with respect to section 7703(d) -- OPM petition for review of any MSPB decision. I have already noted that the majority too easily implies a total lack of judicial review for voluntary retirees in physical disability cases, notwithstanding the fact that in almost a quarter century of

experience under the Scroggins formula there has been no jamming of the courthouse door by the few fingers that have grasped it. Amazingly enough, the majority also chooses this opportunity to preclude judicial review in these cases for OPM as well. This despite the express language of section 7703(d) -- "any final order or decision" -- and the absence in the briefs and arguments of any in-depth discussion of section 7703(d) and its purpose. In order to vest its decision with an aura of consistency the majority not only closes the courthouse door on the fingers of individuals but slams it shut on OPM in 8347(d)(1) cases. Had it not, a reasonable reader of section 7703(d) would be astonished to find that discretionary review of these cases in this court is available to OPM, whereas an individual has no review.

While I readily admit that anomalies in this complex area abound, in my view the better approach is, as I explain below, to let stand the limited Scroggins-level review for individuals as well as the plain language of section 7703(d) pertaining to OPM review. This approach results in equal if not greater consistency than the majority's all-or-nothing stand, since the level of review OPM may receive in this court parallels that of the individual under Scroggins: both aim to catch the worst abuses of the administering agency. See S. REP. NO. 969 at 64, 1978 U.S. CODE CONG. & AD. NEWS at 2786.

Another anomaly resulting from the majority's position is that it results in denial of review to a class of persons -- "individual[s]" under section 8347(d)(1) -- broader than that granted under sections 7703 and 7701 -- "employee[s] or applicant[s] for employment." At least with the Scroggins approach, these "individual[s]" (presumably including at least beneficiaries of employees) receive some type of review, although less than the full 7703 review for "employee[s] or applicant[s] for employment." Anomalies exist either way, but I believe my approach results in less injustice.

Finally, the majority's result is at odds with the broad language of section 7701. Section 7701 covers "any action which is appealable to the Board under any law"; section 8347 fits within "any law." Since all section 7701 actions are reviewable by this court, a conflict arises, for which, unfortunately, the majority offers unsatisfactory explanation.

III.

Given the opposing yet, when viewed in isolation, reasonable results which obtain when one tackles this statutory construction problem beginning at each of the above three starting points, a thoughtful person might conclude that either result (jurisdiction or no jurisdiction) is proper. However, tipping the scales in favor of at least

some sort of review is, in my opinion, the law of the land that, absent clear and convincing evidence of congressional intent to preclude the important right to judicial review, review must be granted. Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975). When the Abbott Laboratories presumption of review is combined with the 1980 activities of Congress in amending section 8347(d), which Judge Davis has succinctly described in his dissent, and the overall appellate framework I have attempted to describe here, I am firmly persuaded that at a minimum Congress intended the Scroggins-level of review to apply to physical disability cases. For this court not only to hold, as the majority does, that section 7703 review does not apply here, but to backtrack and eliminate even the barest of Scroggins-type review, is an unnecessary abdication of our jurisdictional and statutory responsibilities. The majority's holding, totally barring review in these cases, will apply to all petitioners who would seek circuit court review for, under the Federal Courts Improvement Act, it is only this court to which they may now turn.7/

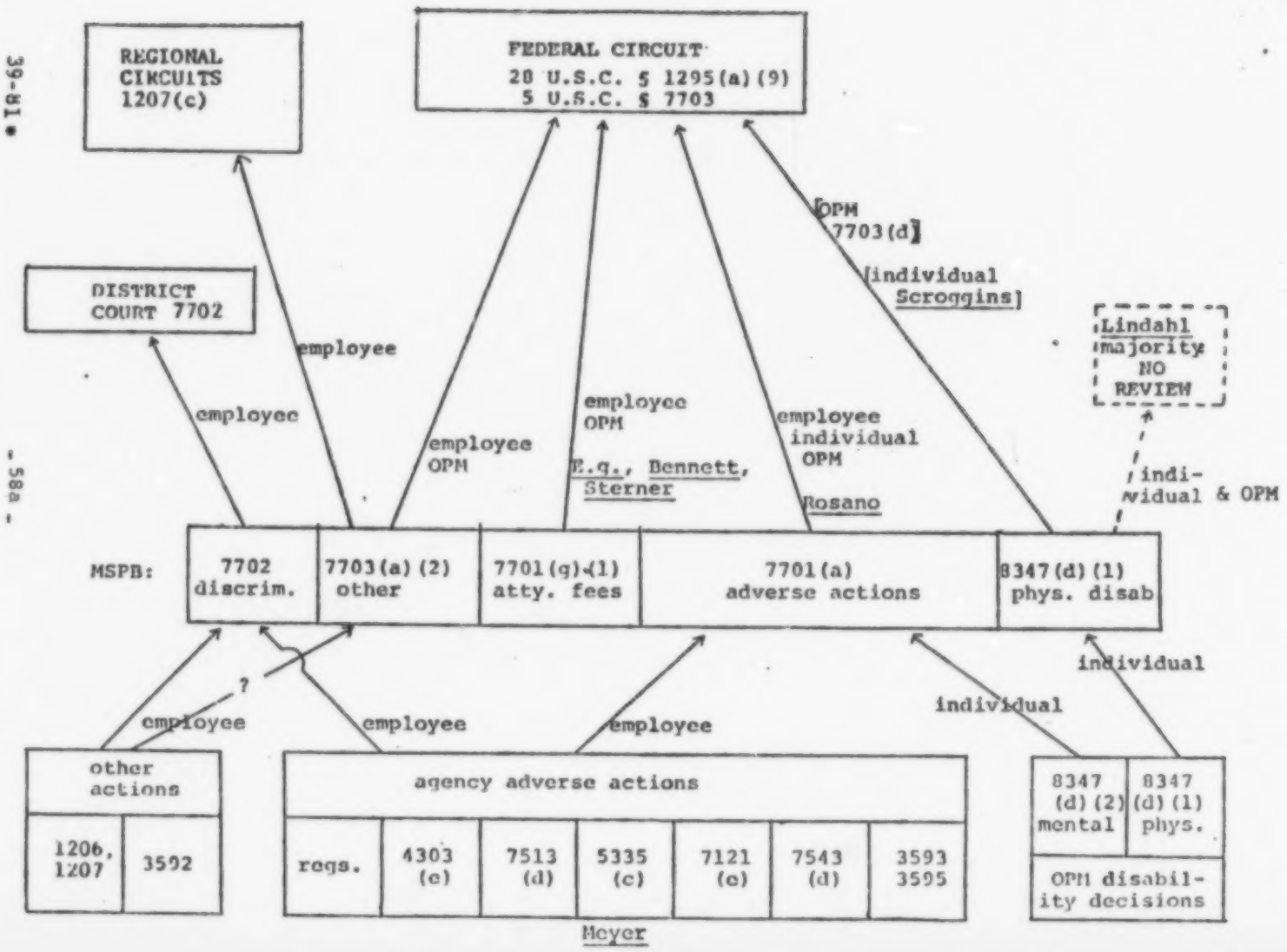
7/ Certainly courts should not strain for jurisdiction where it plainly does not exist, but that "canon" loses some strength where there is a long history of some jurisdiction. Furthermore, it should not be forgotten that, although the Federal Circuit is not "The Civil Service Court" any more than it is "The Public Contracts Court," or even "The Patent Court," Congress has assembled this bench of judges with broad and diverse backgrounds for the purpose.

IV.

I respectfully dissent, and presume to submit the following diagram of the appellate structure created by the Civil Service Reform Act and the Federal Courts Improvement Act, which harmonizes as much as possible all of the provisions of the acts. (To accommodate the majority's position one need only make the dashed lines solid and remove the Scroggins and OPM references.) This diagram is, of course, not the definitive word of this court in this complex area, but I hope that it may serve as a useful analytical tool for those entering this maze of appellate jurisdiction.

7/ (Cont'd)

among others, of establishing as much uniformity as practicable in the civil service area. That legislative policy would be defeated if we choose the path of least jurisdiction when there is no clear mandate to do so. Indeed, there is strong evidence in the legislative history of the Federal Courts Improvement Act that the presumption should be in favor of jurisdiction in those areas where Congress has expressly spoken for and created a court for the purpose of advancing uniformity.


REGIONAL CIRCUITS 1207(c)
FEDERAL CIRCUIT 28 U.S.C. § 1295(a)(9) 5 U.S.C. § 7703
DISTRICT COURT 7702
OPM 7703(d) [individual Scroggins]
Lindahl majority NO REVIEW
employee
employee
employee OPM
employee OPM E.g., Bennett, Sterner
employee individual OPM Rosano
indi- vidual & OPM
MSPB:
7702 discrim.
7703(a)(2) other
7701(g)(1) atty. fees
7701(a) adverse actions
8347(d)(1) phys. disab
?
employee
employee
employee
individual
individual
other actions
1206, 1207
3592
agency adverse actions
regs.
4303 (e)
7513 (d)
5335 (c)
7121 (e)
7543 (d)
3593 3595
8347 (d)(2) mental
8347 (d)(1) phys.
OPM disability decisions
Meyer

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO FIELD OFFICE

WAYNE LINDAHL
v.
OFFICE OF PERSONNEL MANAGEMENT

DECISION NUMBER: SF8311810492
DATE: May 8, 1981

INTRODUCTION

By petition filed January 9, 1981, appellant Wayne Lindahl appealed a December 8, 1980, reconsideration decision from the Office of Personnel Management (OPM) which disallowed his application for disability retirement dated October 15, 1979. Appeal File, AF, Tabs 1, 8, and 22.

JURISDICTION

Since the appellant's application for disability retirement was initiated after January 11, 1979, the effective date of the Civil Service Reform Act of 1978, this appeal is covered by that Act. Pub. L. No. 95-454, 92 Stat. 1111 (1978), (codified in scattered sections of 5 U.S.C.).

A right of appeal from a reconsideration decision by OPM is granted by 5 U.S.C. 8347(d), which states, "An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board." This right of appeal is confirmed by OPM's own regulations, which provide that an appeal to this Board may be made after receipt of the reconsideration decision. 5 C.F.R. 831.1205 (45 Fed. Reg. 23032, April 8, 1980).

Accordingly, this appeal is within the jurisdiction of this Board.

ANALYSIS AND FINDINGS

The evidence upon which this decision is based was obtained from written submissions of both parties and testimony presented at a hearing held in San Francisco, California. OPM was advised of the date, time, and location by notice dated January 27, 1981. AF, Tab 20.

The basic statutory entitlement to a disability retirement is set forth in 5 U.S.C. 8337(a) as follows: "An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency."

The term "disabled" is defined as "totally disabled ... for useful and efficient service in the grade or class of position last occupied by the employee or [illegible] because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled." 5 U.S.C. 8331(6).

At the time of his application, appellant had completed in excess of five (5) years of Federal civilian service covered by the Civil Service Retirement System.

OPM has made no finding or allegation that "vicious habits, intemperance or willful misconduct" played any role in appellant's condition, and this grounds for exclusion under 5 U.S.C. 8331(6) is given no consideration.

The sole substantive issue, therefore, is whether appellant was disabled within the meaning of 5 U.S.C. 8331(6).

Before addressing that issue, however, it is necessary to consider the matter of the degree of proof and which party has the burden of proof to establish the disability.

The cited Civil Service Reform Act (Reform Act) and the Board's regulations provide that in appeals before the Board, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence, 5 U.S.C. 7701(c)(1)(B) (1980), and 5 C.F.R. 1201.56(a)(iii)(1980), except in cases brought under 5 U.S.C. 4303, which covers actions based on unacceptable performance. 5 U.S.C. 7701(c)(1)(1980).

If these provisions were applied to an appeal such as the instant one, OPM would be required to establish, by a preponderance of the evidence, that appellant was not entitled to the disability retirement claimed.

However, the legislative history indicates that in enacting the burden of proof provision, Congress was concerned only with the Board's review of adverse actions concerning misconduct or unacceptable performance. There was no reference to disability retirement appeals. H.R. Rep. No. 95-1717, 95th Cong. 2nd Sess., 130-139 (1978), reprinted in Committee on Post Office and Civil Service, H.R. 95th Cong. 1st Sess., Vol. II, LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1040-1281 (1979).

Furthermore, there is no indication that the cited Board regulation on burden of proof was intended to do anything more than implement the provision of the statute.

The general rule of law requires the party asserting the existence of disputed facts to carry the burden of proof regarding those facts. That is, he or she must persuade the trier of fact that they are true. Williams v. Administrator of National Aeronautics and Space Administration, 463 F. 2d 1391, 1400 (C.C.P.A. 1972); Harper v. U.S., 448 F. 2d 36, 39 (5th Cir. 1971). In this appeal, the appellant has made a claim of disability, OPM has adjudicated that claim, and the appellant has appealed to this Board. If the burden of proof were placed on OPM, the mere presentation of a claim, without supporting evidence, would require OPM to undertake the burden of disproving the claim. Aside from being contrary to the general rule of law cited above, this result would run counter to the well settled principle that the party with the best knowledge of the facts, absent other considerations, should bear the burden of proof as to those facts. Bratton Corp. v. OSHRC, 590 F. 2d 273 (9th Cir. 1979); Old Ben Coal Corp. v. Interior Bd. of Mine Op. Apps., 523 F. 2d 25, 35, (7th Cir. 1975); cf., Mal Vecchio v. Bowers, 296 U.S. 280, 286 (1935).

In voluntary disability retirement cases, the appellant is significantly more likely than OPM to be aware of his or her health and its effect on job performance. Moreover, in similar cases where applicants seek disability benefits under the Social

Security Act, the court has held, "the appellant has the burden of establishing entitlement to disability benefits under the Social Security Act." Billings v. United States, 334 F. Supp. 1392 (D. Nebraska 1971). Also, in Turner v. Califano, 563 F. 2d 669, 670 (5th Cir. 1977), the court held, "the burden of proof in Social Security cases rests upon the claimant." Similarly, the burden of proof rests with the applicant for unemployment compensation, Department of Industrial Relations v. Tomlinson, 36 So. 2d 496 (Ala. App. 1948); for black lung benefits under the Federal Coal Mine Health & Safety Act, Brock v. Weinberger, 405 F. Supp. 1329 (D. Ct. Ark. 1975); and for worker's compensation benefits under the Longshoreme n's Compensation Act, Eschach v. Contractors, Pacific Naval Air Base, 181 F. 2d 860 (7th Cir. 1950).

Therefore, I conclude that the burden is on the appellant in this case to prove that he is entitled to the disability retirement payments which he seeks.

With reference to the standard or degree of proof which the appellant must meet, 5 U.S.C. 7701(c)(1)(B), as noted earlier, requires a preponderance of the evidence standard. The preponderance standard requires a showing of evidence "that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue...." William Parker v. Defense Logistics Agency, MSPB Order Docket No. PH0831930001 p. 2 (Feb. 19, 1980). In addition, the preponderance standard is the usual evidentiary standard in administrative proceedings. B. Manzines, J. Stein, J. Gruff, Administrative Law, 24-28 (1980).

In summary, appellant must prove his disability by a preponderance.

In its reconsideration decision of December 4, 1980, OPM briefly addressed appellant's application, the stated reasons given for the application, appellant's position description as a Police Officer with the Naval Support Activity, Mare Island, Vallejo, California, and the medical evidence. OPM's Medical Director, Dr. George M. Smith, M.D., concluded that appellant had "many subjective symptoms, but very few objective findings to uphold the symptomatology." Dr. Smith noted that appellant's "pulmonary function tests were normal" in concluding that total disability, as required, had not been shown. AF, Tab 4.

Regarding the type of evidence which may be considered in determining disability, I will address the following four categories: (1) the appellant's subjective complaints and evidence of related objective manifestations; (2) appellant's work history, including supervisory observations; (3) objective medical evidence; and (4) expert medical opinions. The weight to be given each of these categories is dependent upon the usual considerations inherent in the weighing of evidence in any individual case (e.g., reliability, relevance). There is no requirement in the relevant statutes, regulations, or rules that only a single type of evidence of a certain character, for example, "objective medical evidence" must be considered.

Concerning evidence of the type in category (1), above, appellant's application disclosed the following description of his disabilities:

> Accumulative, acute pulmonary (sic), chronic bronchitis--severe cough, chills, fever, total exhaustion, sweating, sensitive to hot-cold temperature changes physical exhaustion--tire very easily--lung pains heart attack--cannot recooperate (sic)

strength. Off work--Frequent Doctor's visits and medicine all the time congestion" (Original punctuation).

The stated date of total disability given by appellant was October 28, 1[illegible] AF, Tab 11.

Appellant did not augment these contentions by testimony. The record, however, contains a previous application for disability retirement, dated April 3, 1978, in which appellant cited the following disabilities: "Shortness of breath, pains in my chest, coughing, sneezing, frequent fever and chills. Infection in my lungs. Bronchitis, hypertention." AF, Tab 24.

Regarding work history, category (2), above, no direct evidence of the total amount of lost time due to illness was provided. However, testimony of appellant's supervisors was provided. The substance of their testimony was that appellant's personal physician Beverly Allen, M.D., had provided reports that concluded that appellant should not be assigned overtime and he was also precluded from performing the full range of his duties due to his bronchial condition which was exacerbated by exhaust fumes, dust from [illegible] blasting and smoke from cigarettes. Hearing Transcript, HT, pp. 39-43, 52-54, 73.

One of appellant's supervisor's, R. C. Hicam, Security Officer, testified that appellant had a "very poor attendance record" and had frequent sick leave. HT, p. 70. Another, L. J. Hodges, Chief of Police, noted that appellant frequently complained about irritants. However, Mr. Hodges pointed out that he never observed symptoms of irritation, but only heard appellant's complaints, for example, about smoke in the "squad room". HT, pp 57-58. The record did contain the note in the Supervisor Officer's Statement portion of the application that "when around persons smoking, (appellant) appeared to start coughing." AF, Tab 9.

Taken as a whole, however, the record disclosed a definite lack of evidence of observed symptoms of irritation such as coughing, sneezing, breathing difficulties, watering eyes, etc. or other observable manifestations of appellant's claimed ailments by co-workers and supervisors. I consider this lack of evidence to be of some weight when viewed in the light of medical reports described, below, since these persons were regularly with appellant during duty hours, and no reason has been established or even advanced to discount the statement of Mr. Hodges or to explain this want of objective corroboration.

Before turning to the categories (3) and (4), above, objective medical findings and medical opinion, I note that appellant has referred to his separation from his position by the Naval Support Activity, on October 5, 1980. The record reveals that his separation was proposed and effected for the reason that his "physical condition (had) disabled (him) to such an extent that (he was) unable to perform the full range of duties required....". AF, Tabs 7 and 9; Hearing Exhibit, HT, 1. Appellant's supervisors testified that this decision to separate appellant was based on reports of Dr. Allen which concluded that he could only perform limited not the full range of his duties because of his stated bronchial condition.

It should be noted, therefore, that appellant's supervisors did not conclude appellant could not do his duties because of their own personal observations. Rather their conclusions were based on physicians reports. HT pp. 40, 55-56, 69-70. A Superior Officer's Statement, a part of the disability application noted, "According to his physician, he was not allowed to climb stairs, walk excessively, stand for an extended period of time, come in contact with fumes or cigarette smoke". AF, Tab 8. (Emphasis added).

The Board has repeatedly made clear that a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled under 5 U.S.C. 8331(6) so as to be eligible for a disability annuity under 5 U.S.C. 8337 from OPM. Pace v. OPM, MSPB Order No. SF831L09015 (12/8/80); Cullerton v. OPM, MSPB Order No. CH831L90100038 (3/17/81); Boyd v. OPM, MSPB Order No. SL831L80109[illegible] (3/17/81); Robinson v. OPM, MSPB Docket No. DC831L09014 (3/17/81), citing Polos v. United States, 421 F. 2d 385, 393 (Ct. Cl. 1980), and Piccora v. United States, 407 F. 2d 866, 872 (Ct. Cl. 1969).

The record contains several medical opinions and reports of medical findings. Those completely supportive of appellant's claim were provided by his physician Dr. Allen. Dr. Allen's most recent report of record was dated May 15, 1980. Dr. Allen stated that she had seen appellant on "innumerable occasions with his acute bronchitis" and there was "no doubt whatsoever in (her) mind that each of the attacks ... are (sic) in fact attacks of severe bronchitis". She concluded, "He has frequent uncontrollable coughs, in my opinion undoubtedly caused by pollutants in the air which he breathes .... He also has some psychological component in his suffering." She concluded that he was not capable of working at his position due to his condition, and the "ubiquitous nature" of pollutants in the work atmosphere. AF, Tab 6.

Dr. Allen's statement of September 25, 1979, submitted with the application at issue, provided a diagnosis of "chronic bronchitis," and concluded that appellant was permanently disabled. Under physical findings, Dr. Allen noted that appellant's "treadmill and cardiac x-rays were normal". AF, Tab 22.

Enclosed with her report were copies of records of appellant's hospitalization in January 1979. The Discharge Summary prepared by Dr. Allen showed "Physical Examination: Patient....has little to find". "Laboratory Data" identified no positive test or laboratory findings relative to bronchitis. AF, Tab 20. In a letter to the employing agency, dated June 20, 1979, Dr. Allen noted appellant had recurrent attacks of disabling bronchitis and her opinion that he was incapable of working. AF, Tab 21.

I have also considered Dr. Allen's earlier submitted reports including those transmitted with a previous application for disability retirement to OPM submitted on April 3, 1978. AF, Tab 24. This was denied by OPM on October 17, 1978. AF, Tab 23. This application was based on the claimed bronchitis.

Dr. Allen's report of physical findings noted recurrent episodes of bronchitis. Chest x-ray was "unremarkable except for slight tortuosity of the aorta." Pulmonary function studies were noted without conclusion as to abnormality or evidence of disability. AF, Tab 17. She concluded that appellant was disabled.

variety of environmental irritants to which he has been exposed, including asbestos.

From an objective standpoint, as the result of my examination and review of his films and pulmonary function tests, it would seem to me that his subjective symptoms are somewhat out of proportion to the objective findings, especially in a patient who has never smoked. His ventilation studies reveal a total vital capacity of 5100, which is normal. His FEV_1 is 4200 and the ration of FEV_1 to FVC is 87%, also well within normal limits. We can therefore, I believe, say that there is no evidence of either restrictive or obstructive disease at this time, which would seem to indicate to me that he has little if any interstitial disease from asbestos exposure.

It would seem to me that the most likely classification for his disability would be a chronic type of sensitivity bronchitis superimposed on a hereditary atopic [illegible] type. So far as I can determine, he has never been tried on corticosteroid therapy. As not J, I believe the possibility of minimal pleural asbestosis is very real.

Part of his disability at this time, I believe, is due to poor conditioning, since he is overweight and indulges in very little physical activity. (Emphasis added.)

I have also considered the medical findings of Gerald Levine, M.D., as stated in his report of April 10, 1978. I have considered his findings since they are pertinent to the claimed disabilities, are not significantly removed in time, and they provide objective data on matters addressed by Dr. Allen in her noted reports of 1977 and 1978. AF, Tab 27.

Regarding the relevant condition Dr. Levine noted the following:

> PHYSICAL EXAMINATION: He was a down, large white male with a frequent dry cough during the course of the interview. His blood pressure was 120/90 in the left arm sitting. His heart rate was 72 and regular. Respirations were 17 and unlabored. Head and Neck: The fundi were normal. The pupils were equal and reacted to light. There was no jaundice, pallor, cyanosis, cervical adenopathy, or thyromegaly. His throat was erythematous. The jugular venous pressure was not elevated. He was not using his accessory muscles of respiration. Chest: The lateral expansion was four inches. Percussion was resonant. The breath sounds were vesicular. There were no adventitious sounds. Cardiac: There was no cardiomegaly, murmurs, or gallops. Abdomen: There was no hepatosplenomegaly. Extremities: There was no clubbing, edema, or calf tenderness. The pedal

pulses were present but diminished. Neurological: Physiologically intact.

LABORATORY DATA: The laboratory data included a normal CBC with a hemoglobin of 17.7 gm.% and a hemoglobin of 49.8% with normal red blood cell indices. The white count was 6,000 with a normal differential. A urinalysis was normal. Serum electrolytes, glucose, and BUN were normal as was the remainder of the SMA 12 although the triglycerides nonfasting were minimally elevated to 156. A chest x-ray was interpreted as follows: "Parenchyma is clear. There is minimal diffuse bilateral pleural thickening. Heart is not enlarged. There is a tortuous ascending aorta reflecting perhaps hypertension. There is some elevation of the left diaphragm. No acute disease is identified." An electrocardiogram was within normal limits.

A pulmonary function study included normal static lung volumes with a vital capacity of 4.75 litres which (was) 95% of normal, a residual volume of 102%, a total lung capacity of 97%, and a functional residual capacity of 85%. The mechanics of breathing revealed mild airways obstruction with no significant post-bronchodilator response. The forced vital capacity rose from 5.24 litres before to 5.33 litres after bronchodilator. The forced expiratory volume in one second from 3.14 litres before to 3.01 litres after bronchodilator, and the forced expiratory volume in one second percent, the normal value being greater than 70%, was 60% before and 56% after bronchodilator. The maximal expiratory flow rate was 247 litres per minute before and 239 litres per minute after bronchodilator, the normal range being 432 ± 108 litres per minute. The maximal mid-expiratory flow rate was 2.64 litres per second before and 2.49 litres per second after bronchodilator, the normal range being 3.6 ± 1.1 litres per second. These reveal mild airways obstruction. The helium mixing time was normal excluding maldistribution of inspired air. The diffusion capacity was normal excluding emphysema or interstitial lung disease.

. . .

In my evaluation I had the distinct impression that this man was profoundly depressed. The physical examination for all intents and purposes was within normal limits. The laboratory testing consisted of this evidencing only some mild airways obstruction which could not conceivably account for the degree of problems the patient has described. I do not doubt that he may have recurrent upper respiratory infections, but there does not seem to be any significant underlying immunologic disorder to account for this. I do not feel he has any disability relating to his physical conditioning. He certainly does not have any pulmonary physiological disability. Attention paid to his depressive reaction may be rehabilitative. (Emphasis added.)

Reviewing the record evidence, I note that Dr. Allen has provided conclusions of disability based on her clinical observations of appellant. She described appellant's "uncontrollable coughs". In view of these conclusions it is significant that no such occurrences in the work place were reported by appellant, his co-workers, or supervisors. Reports of physical findings, tests, or other objectively verifiable medical evidence were not provided to support her observations. If it was the case that no such evidence is ever available in such a case, then a competent medical finding stating that conclusion was required but not provided.

Based on Dr. Epstein's report, it is apparent that such tests and other objective indicia of the disabling bronchial condition are susceptible of a[illegible] ailment. Dr. Epstein reviewed test and physical findings and noted "no evidence of either restrictive or obstructive disease" and that appellant's subjective symptoms were disproportionate to cited objective findings.

In light of the lack of evidence of observed symptoms by others and Dr. Epstein's conclusions supported as they were by the cited findings, I conclude that his conclusions are entitled to more weight than Dr. Allen's. In reaching this conclusion I am not unmindful of the length of time of patient relationship between Dr. Allen and appellant. I have also considered that Dr. Smith's opinion, although not based on a physical examination, was entitled to more weight since it was based on a professed review of the record available to that time.

I have not entirely discounted Dr. Williams' opinion of appellant's condition in [illegible] 1977 regarding the chronic bronchitis, but conclude that the qualifying character of his conclusion, "probably disabled," in the absence of cited positive, objective physical findings, diminishes the weight to be accorded to it. Furthermore, Dr. Levine's conclusions based on his review of tests and stated data are consonant with those of Dr. Epstein, and provide persuasive rebuttal to Dr. Williams.

Having heard, read and considered the record evidence, I find that appellant has not established by a preponderance of the evidence that he has a disease or injury which renders him totally disabled for useful and efficient service in his last occupied position. Accordingly, I conclude that he is not entitled to disability retirement pursuant to 5 U.S.C. 8337.

DECISION

The December 4, 1980, decision of the Office of Personnel Management which denied appellant's application is hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 12, 1981 unless a petition for review is filed with the Board within 30 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H Street, N. W., Washington, D. C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Under 5 USC 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

PHILIP L. ARNOLD
PRESIDING OFFICIAL

United States of America
Office of Personnel Management
Washington, D C 20415

April 8, 1980

Wayne Lindahl
2685 Magee Avenue
San Pablo, CA 94806

CLAIM NUMBER
CSA 2 115 707
POSITION
Police Officer

Your application for retirement under the disability provisions of the Civil Service Retirement Law has not been approved because total disability for useful and efficient service in the above position is not shown.

A careful review and evaluation by the Office of Personnel Management's medical staff of all evidence submitted in your case fails to establish that you have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position from which you are seeking retirement. Since the retirement law does not authorize benefits based on partial disability, your application cannot be approved at this time.

If you believe that the action taken on your application is not proper, you may request reconsideration of our finding within 30 calendar days after the date you receive this letter. Any request you make should show your name and address (including ZIP code), the claim number shown above and the reason for the request for reconsideration. You may submit with your request any additional evidence which you think might support your request. Address your request for reconsideration to the address indicated below.

By reason of your separation you are entitled to annuity beginning when you reach age 62. You may choose to receive an immediate refund of all of your retirement deductions instead of annuity benefits at age 62. If you desire the refund you should complete an Application for Refund of Retirement Deductions, Standard Form 2802, at least 31 days before your 62nd birthday.

Office of Personnel Management
Chief, Medical Operations Branch
Washington, D.C. 20415

Sincerely yours,

Retirement Claims
Retirement Operations Branch

Enclosure

APPENDIX C

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF RETIREMENT, INSURANCE, AND OCCUPATIONAL HEALTH
WASHINGTON, D.C. 20415

March 21, 1980

CLAIM NUMBER
CSA 2 113 707
SOCIAL SECURITY ACCOUNT NUMBER
473-18-5184

Mare Island Naval Shipyard
Vallejo, California 94592

DISABILITY RETIREMENT NOT APPROVED

NAME (Last) (First) (Middle)	DATE OF BIRTH	POSITION
Lindahl Wayne NMN	7-2-25	Police Officer
DEPARTMENT OR AGENCY	**LOCATION**	
Naval Support Activity	Mare Island Naval Shipyard, Vallejo,CA 94592	

The above-named employee's application for annuity under the Civil Service Retirement System has been disallowed for the reason checked below:

1 ☐ Decision for disallowance is based on additional medical evidence from an authoritative source.

2 ☒ Medical disorder involved is not disqualifying for full performance of duties of the employee's position under qualifications standards.

3 ☐ Applicant did not become disabled during last position occupied.

(If your medical officer desires further information on the reason for disallowance checked above, he is invited to communicate directly with the Commission's responsible medical officer. Our medical officer will furnish him a full explanation of the reasons for rejection in relation to the civil service program.)

4 ☐ Applicant has less than 5 years creditable civilian service, the minimum required for title to annuity.

5 ☐ Dismissed at request of applicant.

6 ☐ Dismissed for lack of evidence because applicant did not report for medical examination.

7 ☐

CLAIMS DIVISION

RI 44-39
JULY 1972

United States
Office of
Personnel Management Washington, D.C. 20415

In Reply Refer To Your Reference

Received on Dec 23-80 w.f.

CSA 2 115 707

Wayne Lindahl
2685 Magee Avenue
San Pablo, California 94806

DEC 4 1980

Reconsideration request of Wayne Lindahl
5USC 8331(6).8337

ederal Personnel Manual Supplement 831-1, Subchapter S10 sets out the conditions that must be met by an employee in order to be eligible for an immediate annuity because of disability retirement. One of these conditions is that an employee must, while employed subject to the retirement system, have become totally disabled for useful and efficient service in his or her position. To make this determination, the claim is reviewed with attention to the following considerations:

1. Documentation of a deficiency in service with respect to performance, conduct or attendance.
2. Documentation of a medical condition - disease or injury.
3. A relationship between the service deficiency and the medical condition such that the medical condition has caused the service deficiency.
4. The expected duration of the medical condition.
5. The incompatibility of the medical condition with either useful service in or retention in the position.

A determination of total disability is made when the information in the file indicates that there is a service deficiency of sufficient degree, caused by disease or injury which would preclude useful and efficient service by the employee.

The records show that your disability retirement application was signed on October 9, 1979. The objective medical evidence submitted in your case failed to establish that you were totally disabled within the meaning and intent of the civil service retirement regulations and thereupon the claim was disallowed. On March 21, 1980, you were sent notification that your claim was denied. You requested reconsideration of this action by letter dated May 15, 1980, which was accepted to initiate a review of your claim.

CSN 114-04-3
January 1980

The requirements of the last position occupied, that of Police Officer are noted. We have evaluated all of the information that was presented. The data includes:

1. Letter - Beverly G. Allan, M.D. - May 15, 1980
2. Report - Superior Officer - May 18, 1980
3. Letter - Ray C. Nieman - May 27, 1980

In your application, you gave reasons for requesting a disability retirement annuity as follows:

1. Acute pulmonary problems
2. chronic Bronchitis
3. severe cough
4. chills
5. fever
6. total exhaustion
7. tire very easily
8. lung pains
9. heart attack
10. cannot recuperate strength
11. off work frequently
12. sweating
13. sensitive to hot and cold temperature changes
14. physical exhaustion.

Your supervisor cites that according to the physician, you were not allowed to climb stairs, walk excessively, stand for extended time, come in contact with fumes or cigarette smoke.

You have many subjective symptoms but very few objective findings to uphold the symptomatology. Part of your disability at this time is due to poor conditioning since you are overweight and indulge in very little physical activity according to Dr. Frederick Epstein. Pulmonary function tests are normal.

While your condition is admittedly bothersome, there are no clinical findings which document a physical impairment incompatible with retention in your position or the fulfillment of your assigned duties.

We recognize that there may be discomforts and annoyances present; however, we lack objective medical findings to support a sustained condition of total disablement for your position held. There are no provisions in the disability retirement regulations for annuity payments for partial disability.

An analysis of all the facts and the total medical evidence in the file leads us to a conclusion that additional medical examinations are no indicated and allowance of your claim is not warranted.

Should you wish to initiate an appeal of this decision, mail it directly to: Regional Administrator, Merit System Protection Board
525 Market Street
24th Floor
San Francisco, California 94105

Along with the letter of appeal you should submit any further medical or other evidence to substantiate your claim.

We regret that the facts of the case do not allow us to give you a more favorable determination.

Sincerely yours,

George M. Smith, M.D.
Medical Director

DECISION

From the review of the entire claim file, we find the action of disallowance of your disability claim was proper. Therefore, the decision of disallowance of your application is sustained.

This becomes the final decision of the Office of Personnel Management. This decision may be appealed to the Merit Systems Protection Board within 20 calendar days of the day on which it is received.

Should you wish to initiate an appeal of this decision, mail it directly to :

Regional Administrator,
Merit Systems Protection Board
525 Market Street
24th Floor
San Francisco, California 94105

Along with the letter of appeal you should submit any further medical or other evidence to substantiate your claim.

We regret that the facts of the case do not allow us to give you a more favorable determination.

Sincerely yours,

George M. Smith, M.D.
Medical Director

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises a right to participate in a proceeding before the Board, he shall do so early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply to, or by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and which shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding calendar year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

APPENDIX D

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the Court of Claims or a United States court of appeals as provided in chapters 91 and 158, respectively, of title 28. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Claims or a United States court of appeals, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Added Pub.L. 95-454, Title II, § 205, Oct. 13, 1978, 92 Stat. 1143.

§ 8347. Administration; regulations

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

(b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

(e) The Office shall fix the fees for examinations made under this subchapter by physicians or surgeons who are not medical officers of the United States. The fees and reasonable traveling and other expenses incurred in connection with the examinations are paid from appropriations for the cost of administering this subchapter.

(f) The Office shall select three actuaries, to be known as the Board of Actuaries of the Civil Service Retirement System. The Office shall fix the pay of the members of the Board, except members otherwise in the employ of the United States. The Board shall report annually on the actuarial status of the System and furnish its advice and opinion on matters referred to it by the Office. The

§ 1201.56 Burden and degree of proof, affirmative defenses.

(a) *Burden and degree of proof.* (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Substantial evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

(2) *Preponderance of the evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) *Harmful error:* Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

(d) *Moving forward.* In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

APPENDIX G

Documents, is attached to the application for retirement submitted direct to the Bureau of Retirement, Insurance, and Occupational Health.

(2) *Employee in the Washington, D.C. Metropolitan Area.* (a) With the employee's application for retirement, the following documents are submitted to the Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D.C. 20415:

(i) Statement of employee's superior officer, SF 2801–A.

(ii) Statement of the employee's attending physician, preferably on SF 2801–B.

(iii) Report of examination by a Federal medical officer (if adequate medical facilities are readily available within the employing agency), *or* statement that no medical facilities are available within the agency.

b. **Direct filing after separation of at least 31 days.** Regardless of place of employment, an employee separated more than 30 days may submit his or her application for retirement direct to the Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission, Washington, D.C. 20415, accompanied by a statement of his or her attending physician. The Commission will contact the agency for any necessary additional information.

S10–10. FILED-BY-AGENCY DISABILITY RETIREMENT PROCEDURES

a. **Procedural responsibilities of agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem.** (1) *Procedures.* An agency should follow the procedures prescribed by the regulations if the deficiencies in an employee's service, conduct, or attendance are such that removal may be necessary to promote the efficiency of the service, or if the employee's behavior or physical condition is such that it presents a significant disruptive influence or risk to the safety of others in the work environment. These procedures are of two types: Those that are *required* and those that are *recommended* as good personnel practices. The required procedures must be observed in every case. The Civil Service Commission will remand to agencies without action any agency-filed disability retirement case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application. An employee has the right to be represented at any time during these procedures. Hereafter in this section, the word *employee* includes the concept of representative where appropriate, and all rights, notices, etc., are available to representatives.

(2) *Making preliminary decision.*

(a) The agency is required to make a preliminary determination that the employee's performance, attendance, or behavior is below the level of acceptability, and on the basis of management evidence, that a health problem exists which could account for the service deficiencies. Management evidence means information obtained from such readily available sources as supervisory observation of job performance, absence from duty, or knowledge of illness, accident, or hospitalization.

(b) It is recommended that supervisors and personnel officials consult informally with the agency medical officer to explore possible medical solutions to the employee's problems.

(3) *Establishing a prima facie case.* The agency is required to establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his or her alleged illness or injury. Except where an issue of safety of life or property or an issue of security clearance can be decided only upon the basis of the state of physical or mental health of the employee, to be sufficient, the available evidence should be such that it will

warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement.

(4) *Conducting a counseling session*

(a) It is recommended that, if possible, the agency have a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him or her before any formal action is initiated. A transcript need not be made of this session. If a counseling session is not held, the reasons should be given in the record. One of the primary purposes of the counseling session is to explore with the employee the possibility of reassignment to another position. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work.

(b) The agencies are reminded that executive branch policy encourages maximum use of the services of the agency coordinators for the employment of the handicapped. Instructions pertaining to reassignment in lieu of disability retirement appear in FPM chapter 306, subchapter 8. The coordinator will also be able to provide information on vocational rehabilitation made available through the counselors from the various State agencies. The counselor from the State vocational rehabilitation agency can be useful to the employee and the agency in selective placement efforts because of his or her knowledge of disabilities and job requirements, and can make recommendations regarding vocational rehabilitation services. The agency may assist an employee in availing him or herself of the services offered by a vocational rehabilitation agency, but this assistance has no effect on any action taken under instructions in this supplement or related instructions appearing elsewhere in the FEDERAL PERSONNEL MANUAL.

(c) The agency should not overlook the possibilities of transfer of the employee to a position in another agency. An employee's failure to choose reassignment at this time should *not* be considered final. Offers should be held open, if possible, and any other opportunities that arise before the employee's separation should be explored.

(5) *Obtaining medical evidence*

(a) If the counseling session has not made an alternative course of action possible, the agency may direct the employee to report for a fitness-for-duty examination as instructed by the following paragraphs. If evidence already available is apparently sufficient (preferably in the judgment of a medical officer, particularly when a possible mental illness is indicated) to establish that the deficiencies in the employee's service are caused by disease or injury, such an examination would be unnecessary.

(b) When the agency has decided that available medical evidence is apparently inadequate, the employee's supervisor or other manager familiar with the employee's performance on the job must decide, with the assistance of any available medical advice, whether the possible health problem(s) affecting the employee's service can be evaluated by a general physical examination, an examination by a specialist in a physical disorder, or a psychiatric examination. If a general physical examination or an examination by a specialist in a physical disorder is indicated, the agency may order an appropriate fitness-for-duty examination, as follows:

(i) A written notice must be prepared to order the employee to report for the examination. This notice must inform the employee of the reasons for the examination. This notice must also provide instructions to the employee on how to participate in the selection of a medical examiner if he or she desires to do so. An employee has the right to be represented, and should be

so informed by this notice (see (c)(ii)*1* below).

(ii) If an employee objects to being examined and is unwilling to select a different medical examiner, the agency may consider bringing charges against the employee which may *include* a charge of refusing to report for an examination as directed.

(iii) When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner named by the agency to serve as background for his examination. Any information presented to the medical examiner is also made available to the employee or a physician designated by the employee in writing for this purpose.

(iv) The medical examiner will be asked to state his or her opinion on whether the employee should be given further testing or examination. Further examination may not be ordered unless recommended by the medical examiner.

(c) If the employee's supervisor or other manager familiar with the employee's performance on the job decides that the behavior of the employee has been such as to raise the possibility that the illness is mental or emotional, and recommends a psychiatric examination, or if a physical examination was made and the medical examiner recommends a psychiatric examination:

(i) An employee may not be ordered to report for a psychiatric examination unless a majority of a panel of at least three agency officials agree that the circumstances warrant such action.

(ii) If a majority of the agency panel agrees that a psychiatric examination is indicated, such an examination will be ordered as follows:

1. If a psychiatric examination is to be ordered, appointment of a representative is required. An employee may name a representative at any time, but if he or she fails to name one voluntarily, the agency should urge the employee to do so before ordering a fitness-for-duty psychiatric examination and offer him or her assistance by naming the kinds of persons who make good representatives. If the employee does not name a representative at the agency's urging, the agency must appoint a representative who will receive copies of all notices, determinations, decisions, or other written communications issued to the employee under these procedures.

2. A written notice to the employee must be prepared to order the examination as above.

3. If the employee objects to the medical examiner named by the agency, he or she will be asked to submit the names of three to five board-certified psychiatrists to whom the employee would be willing to report. The agency will then select a medical examiner from the list and arrange an examination.

4. When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner to serve as background for his or her examination. The agency will make available only to a licensed physician, designated in writing for that purpose by the employee or his or her representative, a full report of the medical evidence in his or her file including a copy of the reported behavior irregularities or manifestations of unsatisfactory service.

5. If the employee refuses to cooperate altogether, the agency must document all instances of alleged behavioral deficiencies on which the decision to order a psychiatric examination was based. This lay evidence may serve as the basis for an agency-filed application for disability retire-

ment in the case of an emotionally disturbed employee.

(d) If the agency selects a representative, it may choose a family member, union officer, veteran's service officer, or if no other representative is available, an employee of the agency. An employee should be chosen as representative only as a last resort and should not be an employee under the jurisdiction of the supervisor initiating the request for disability retirement. An ideal agency panel to consider whether a psychiatric examination should be ordered would include an immediate *supervisor or manager, a personnel official, and an agency medical officer if one is available*, but other officials may be used when necessary. Members of such a panel do not have to actually hold a meeting to reach a decision on the file.

(6) *Duty status.* The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his or her consent, or without consent when the circumstances are such that retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive Orders, and regulations.

(7) *Making tentative determination.* On the basis of all available evidence, the agency is required to decide whether deficiencies in the employee's service are caused by illness or injury. If not, adverse action procedures may be instituted if warranted. If the agency decides that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, it then must notify the employee of this tentative determination that he or she meets all requirements to be retired for disability. The notice must:

(a) Be in writing;

(b) Give reasons for tentative determinations;[1]

(c) Include an explanation of the employee's right to reply orally, or in writing, or both, and to submit affidavits or documentary evidence or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting a reply; and an explanation of the right to representation, if a representative has not already been designated;

(d) Advise the employee of the right (or that of his or her physician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense; and

(e) Name the official designated to receive employee's oral reply.

(8) *Answering tentative determination.* If the employee answers the agency notice of tentative determination, all documentary evidence (i.e., medical reports, hospital records, affidavits, or statements) offered by the employee or his or her representative must be received, considered, and included in the case file. An oral reply to the previously designated agency official must be summarized in writing and included in the case file. An additional copy, approved or supplemented by the employee, must be included in the case file. The employee may amend his or her copy of the summary or submit correction or supplementation within five calendar days. The designated agency official may make or recommend the decision

[1] Where a prudent physician would hesitate to inform the employee fully of the details of his or her physical or mental condition, details of the medical evidence will not be given to the employee, but must be given only to a licensed physician designated in writing for that purpose by the employee or by a designated representative. Medical evidence will be given to the designated licensed physician with the understanding that he or she may use his or her own professional judgment in deciding how much information to disclose to the patient or the patient's representative. Rather than exercise discretion, an agency may in all cases give the medical evidence only to a licensed physician.

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

IN REPLY REFER TO
02C:CB:jlf
12752
02C/213
4 SEP 1979

From: Security Officer
To: Wayne (ROAN) Lindahl, Police Officer, Employee Number 479-16-5184

Subj: Advance Notice of Proposed Separation - Disability

Ref: (a) FPM Chapter 752
(b) FPM Supplement 752
(c) FPM Chapter 306
(d) FPM Chapter 339

Encl: (1) Copy of your Position Description Number 78-31-7/43

1. Nature of Action. This is to inform you that it is proposed to separate you from employment at this Activity in accordance with reference (a) through (d). This action is being proposed because your physical condition has disabled you to such an extent that you are unable to perform the full range of duties required of your position as a Police Officer.

2. Effective Date. Your proposed separation, if found warranted, will not be effected before a notice period of thirty (30) full calendar days has expired. The notice period begins the day following your receipt of this notice.

3. Reason for Action. The specific facts and reasons supporting this proposed separation are as follows:

a. The full range of duties required to be performed by you as a Police Officer are contained in enclosure (1).

b. On 26 June 1979 your private physician, Dr. Beverley C. Allan wrote a statement certifying you have recurrent attacks of disabling bronchitis and you exhibit extreme irritability to your bronchial tree when you are subjected to pollutants or various other irritants. She went on to list the irritants which include vegetable dusts of various kinds, paint fumes, glue, solvents, strong acid fumes, tobacco smoke, and exhaust fumes. She added, it continues to be her opinion that because of the ubiquitous nature of these pollutants in the work atmosphere you are incapable of working. Dr. Allan further stated you were to work no overtime and no heavy exertion.

c. Dr. J. P. Williams of the Mare Island Naval Shipyard Industrial Dispensary has evaluated your physical qualifications to effectively perform the full range of duties as a Police Officer. Your capacity to perform these duties was found to be as follows:

02C:C3:jlf
12752
Ser 02C/213

4 SEP 1979

Environmental and Functional Factors

No capacity - Usual overtime work, exhaust fumes, paint fumes, dust, silica, asbestos, fumes, smoke or gases, and solvents (degreasing agents).

Partial capacity - Moderate lifting 15-44 lbs. and moderate carrying 15-44 lbs.

d. Because of your physical condition, it is not possible to assign you to the full range of duties required of a Police Officer at this Activity.

e. Since you occupy a position which provides continuing services around the clock, it is not possible for this Activity to permit the position to remain unfilled.

f. Placement in another position in the Activity has been considered; however, there is no vacant position for which you are technically and physically qualified in which you can be placed.

4. Reply. You may reply orally and in writing to this Advance Notice of Proposed Separation - Disability and you may furnish affidavits in support of your reply. In addition, you are entitled to be represented by an attorney or other representative. Your response and any relevant material must be submitted not later than ten (10) calendar days from the date of this advance notice and shall be addressed to the Security Officer, Naval Support Activity, Mare Island, Vallejo, California 94592. Full consideration will be given to any reply you may make. The referenced material which supports this advance notice may be reviewed in the Personnel Office, Code 02C, Building 851. You will be allowed a maximum period of four (4) hours of official time to review this material.

RAY C. NIEMAN

I HEREBY CERTIFY RECEIPT OF ORIGINAL CORRESPONDENCE ON aug 5-79 (Date)

Wayne Lindahl (Name) 479185184 (Employee Number)

2

PHYSICIAN'S STATEMENT

FOR EMPLOYEE DISABILITY RETIREMENT PURPOSES
CIVIL SERVICE RETIREMENT SYSTEM

PART A—TO BE COMPLETED BY APPLICANT

INSTRUCTIONS 1. Complete Part A and give this form to your physician. He should complete Part B and mail it to the address you furnish in Item 9, below.
2. As an applicant, you are responsible for paying any expense incurred in completing this form.

1. PRINT OR TYPE FULL NAME (Last, First, Middle)	2. DATE OF BIRTH (Mo., Day, Yr.)	3. SOCIAL SECURITY ACCOUNT NUMBER
LINDAHL, Wayne (NMN)	7-2-26	479-18-5184

4. ADDRESS (Including ZIP Code)	5. TELEPHONE NUMBER (Including Area Code)
2685 Magee Ave. San Pablo, CA 94806	(415)758-9521

6. TITLE OF FEDERAL (OR D.C.) GOVERNMENT POSITION OCCUPIED AND BRIEF DESCRIPTION OF DUTIES

Police Officer, GS-083-5

See attached Position Description

7. BRIEFLY DESCRIBE YOUR DISABILITIES, STATE WHEN INCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION

Since October 1976 my private physician diagnosed a state of debilitating bronchitis which has been getting worse through the past 3 years. Because they are recurrent and debilitating it is now effecting the performance of my duties as a Police Officer

The physician has stated that it is job-irritated and will continue to become worse.

Because of the stress and atmosphere involved in job area the doctor has recommended that I retire.

8. RELEASE OF MEDICAL INFORMATION — I authorize the release of this statement and related medical information to my employing agency and the U.S. Civil Service Commission.

SIGNATURE: Wayne Lindahl — DATE: Sept. 6-1979

9. IN SPACE BELOW, ENTER THE EXACT NAME AND ADDRESS (INCLUDING ZIP CODE) OF YOUR EMPLOYING OFFICE.

ADDRESS TO WHICH PHYSICIAN SENDS STATEMENT →

Mare Island Naval Shipyard-Retirement Section
Vallejo, California 94592

PART B—TO BE COMPLETED BY PHYSICIAN

INSTRUCTIONS 1. Report in detail the clinical symptoms and findings upon which your diagnosis and conclusions are based. A complete and objective report may permit a decision on the claim for disability without need for further examination and inconvenience to the applicant.
2. Send the completed form to the office named by the applicant in Item 9, Part A. Please mark envelope "Disability Retirement-Privileged-Private."

MEDICAL HISTORY

1. HOW LONG HAS APPLICANT BEEN UNDER YOUR PROFESSIONAL CARE FOR THE INDICATED DISABILITY? (Give date)	2. WHEN DID YOU LAST SEE THE APPLICANT FOR EXAMINATION OR TREATMENT? (Give date)
October of 1976	9/5/79

3. IF APPLICANT IS CURRENTLY HOSPITALIZED OR HAS BEEN HOSPITALIZED RECENTLY, PLEASE FURNISH:

NAME AND ADDRESS (INCLUDING ZIP CODE) OF HOSPITAL OR OTHER MEDICAL FACILITY	DATE OF DISCHARGE	DATE OF ADMISSION
Kaiser Hospital 1330 Cutting Blvd. Richmond, Calif. 94801	2/1/79	1/23/79

PLEASE ATTACH SUMMARY REPORT OF HOSPITALIZATION OR ABSTRACT OF HOSPITAL RECORDS

PHYSICIAN: PLEASE COMPLETE OTHER SIDE OF THIS STATEMENT ALSO

2801-304

Standard Form 2801-B
U.S. Civil Service Commission
July 1972
FPM Supplement 831-1

APPLICATION FOR RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

(USE ONLY IF SEPARATED ON OR AFTER OCTOBER 20, 1969)

To Avoid Delay—1. Read Information Carefully; 2. Complete Application in Full; 3. Typewrite or Print in Ink

A. IDENTIFYING INFORMATION

1. NAME (Last) (First) (Middle)	2. LIST ALL OTHER NAMES YOU HAVE USED
LINDAHL WAYNE (NMN)	NONE

3. ADDRESS (Including ZIP code)	4. PHONE NUMBER (Including Area Code)	5. DATE OF BIRTH (Month) (Day) (Year)	6. SOCIAL SECURITY ACCOUNT NUMBER
2685 MAGEE AVE. SANPABLO, CA. 94806	415 7589521	JULY 2 1926	479 18 5184

7A. ARE YOU A CITIZEN OF THE UNITED STATES OF AMERICA?	7B. IF "NO", OF WHAT COUNTRY ARE YOU A CITIZEN?
☒ YES ☐ NO	

8A. ARE YOU MARRIED	8B. IF "YES" GIVE THE FOLLOWING INFORMATION				
☒ YES ☐ NO	WIFE'S OR HUSBAND'S NAME (First) (Middle)	HER (OR HIS) BIRTH DATE (Month) (Day) (Year)	HER (OR HIS) SOCIAL SECURITY ACCOUNT NUMBER	DATE OF MARRIAGE (Month) (Day) (Year)	PLACE OF MARRIAGE (City) (State)	MARRIAGE PERFORMED BY ☒ CLERGYMAN OR ☐ OTHER (Specify)
	MARY LOU	MARCH 3 1928	546361728	DEC. 28 1950	RICHMOND, CALIF.	

9A. DO YOU HAVE ANY UNMARRIED CHILDREN UNDER AGE 22 (Or over age 22 and incapable of self support because of a disability incurred before age 18)? ☐ YES ☒ NO

9B. IF "YES" LIST NAME AND DATE OF BIRTH OF EACH CHILD. WRITE THE WORD "DISABLED" AFTER CHILD'S NAME WHERE APPLICABLE

CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)	CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)

B. CIVILIAN AND MILITARY SERVICE

1. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION, AND ADDRESS, INCLUDING ZIP CODE	2. DATE OF FINAL SEPARATION (Month) (Day) (Year)	3. APPROXIMATE YEARS OF FEDERAL SERVICE CIVILIAN / MILITARY
Naval Supply Activity Mincy Dept, Vallejo CA 94592 Bldg 851 -02- Code 4th Patrol Branch	Oct. 5 1979	12 YRS / 7 YRS 6 MOS

4. TITLE OF LAST POSITION: POLICE OFFICER

5. DO YOU HAVE FEDERAL EMPLOYEES GROUP LIFE INSURANCE?	6. IF YOU HAVE REGULAR LIFE INSURANCE, DO YOU ALSO HAVE OPTIONAL LIFE INSURANCE?	7A. HAVE YOU BEEN ENROLLED IN A PLAN UNDER THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM SINCE YOUR FIRST OPPORTUNITY TO ENROLL OR FOR AT LEAST FIVE YEARS IMMEDIATELY BEFORE YOUR RETIREMENT?	7B. IF "YES" PLEASE LIST YOUR CURRENT: CARRIER	CONTROL NUMBER	ENROLLMENT CODE NUMBER
☒ YES ☐ NO	☐ YES ☒ NO	☒ YES ☐ NO	Kaiser Foundation Health Plan	3C-1598322	F.1

8. COMPLETE THE SCHEDULE BELOW IF YOU HAVE PERFORMED ACTIVE DUTY THAT TERMINATED UNDER HONORABLE CONDITIONS IN ANY OF THE FOLLOWING SERVICES: (A) ARMY, NAVY, MARINE CORPS, AIR FORCE, OR COAST GUARD OF THE UNITED STATES OR (B) REGULAR CORPS OR RESERVE CORPS OF THE PUBLIC HEALTH SERVICE AFTER JUNE 30, 1960, OR (C) AS A COMMISSIONED OFFICER OF THE COAST AND GEODETIC SURVEY AFTER JUNE 30, 1961, OR (D) AS A COMMISSIONED OFFICER OF THE ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION. ATTACH A COPY OF YOUR DISCHARGE CERTIFICATE OR OTHER CERTIFICATE OF ACTIVE MILITARY SERVICE, IF AVAILABLE

BRANCH OF SERVICE	SERIAL NUMBER	DATE OF ENTRANCE ON ACTIVE DUTY	DATE OF SEPARATION FROM ACTIVE DUTY	LAST GRADE OR RANK	ORGANIZATION AT DISCHARGE (Div., Regt., Co., etc.)
U.S. NAVY	957 86 36	NOV 14-44	APRIL 6-46	SEAMAN 1st CLASS	USM 234
U.S. NAVY	957 86 36	OCT. 28 47	OCT 26-50	FIREMAN/STOKER	PA. 965 FLT. CAR
U.S. NAVY	957 86 36	27 OCT. 1950	DEC 16 1953	ME 2nd CLASS	NAV HOSP. MARTINEZ

9A. ARE YOU A MILITARY RESERVIST (Either Active or Inactive)?	9B. ARE YOU IN RECEIPT OF OR HAVE YOU EVER APPLIED FOR MILITARY RETIRED PAY? (Retired pay does not include V.A. pensions or compensation.)	9C. IF "YES" WERE YOU RETIRED FROM A RESERVE COMPONENT UNDER CHAPTER 67, TITLE 10, USC? (Formerly Title III, Public Law 90-010)
☐ YES ☒ NO	☐ YES ☒ NO	☐ YES ☐ NO

C. DISABILITY INFORMATION (Only Applicants for Total Disability Retirement Will Complete This Part)

1. BRIEFLY DESCRIBE YOUR DISABILITIES, STATE WHEN OCCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION. (ATTACH ADDITIONAL COMMENTS ON PLAIN SHEET OF PAPER, IF NECESSARY.) ALSO, STATE MONTH AND YEAR IN WHICH YOU BECAME TOTALLY DISABLED. CHRONIC NO 2. Lungs Bronchitis ACCUMULATIVE PULMONARY SEN. FIVE to TEN Package TIRED OUT. EXHAUSTION-TO OUT OF BREATH HEART ATTACK WALKING and BEING PHYSICAL EXHAUSTION Forms attached

D. OTHER CLAIM INFORMATION

1A. HAVE YOU EVER RECEIVED OR MADE APPLICATION FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT?	1B. IF "YES" STATE THE NUMBER OF YOUR COMPENSATION CLAIM AND THE PERIOD FOR WHICH YOU RECEIVED COMPENSATION. CLAIM NUMBER: A13505919 FROM (Mo.) (Day) (Year) TO (Mo.) (Day) (Year): under Adjudication (WAIT)
☒ YES ☐ NO	
2A. HAVE YOU PREVIOUSLY FILED ANY APPLICATION UNDER THE CIVIL SERVICE RETIREMENT SYSTEM, INCLUDING APPLICATION FOR RETIREMENT, REFUND, DEPOSIT OR REDEPOSIT, OR VOLUNTARY CONTRIBUTIONS? ☒ YES ☐ NO	2B. IF "YES" INDICATE THE TYPE(S) OF APPLICATION AND GIVE THE CLAIM NUMBER(S) IF KNOWN. ☒ RETIREMENT ☐ DEPOSIT OR REDEPOSIT ☐ REFUND ☐ VOLUNTARY CONTRIBUTIONS. CLAIM NUMBER(S): CSA 2115267
3A. DO YOU HAVE LIFE INSURANCE THROUGH A FORMER EMPLOYEE BENEFICIAL ASSOCIATION FOR WHICH YOU NOW PAY PREMIUMS TO THE CIVIL SERVICE COMMISSION? ☐ YES ☒ NO	3B. IF "YES" GIVE YOUR ACCOUNT NUMBER: —
4A. HAVE YOU EVER BEEN EMPLOYED UNDER ANOTHER RETIREMENT SYSTEM FOR FEDERAL OR DISTRICT OF COLUMBIA EMPLOYEES? ☐ YES ☒ NO	4B. IF "YES" GIVE THE NAME OF THE OTHER RETIREMENT SYSTEM:

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

IN REPLY REFER TO
02C:CB:jlf
12752
Ser 02C/227
17 SEP 1979

From: Commanding Officer
To: Wayne (NMN) Lindahl, Police Officer, Employee Number 479-10-3184

Subj: Notice of Decision to Effect Separation - Disability

Ref: (a) FPM 752
(b) FPM 339

Encl: (1) Copy of Advance Notice of Proposed Separation - Disability 02C:CB:jlf 12752 02C/213 of 4 Sep 79
(2) Appeal Rights

1. Decision. In accordance with references (a) and (b), you are hereby notified of my decision to effect your separation from employment at this Activity.

2. Effective Date. This separation will be effected on 5-October-1979.

3. Reason for Action. This separation is being effected for your inability to perform the full range of duties of your rating, Police Officer, because of physical disability.

4. Restatement of Reason. The reason upon which this separation action is based is restated in enclosure (1).

5. Findings in Review of Reason. Enclosure (1) notified you of your right to reply personally and in writing to the Advance Notice of Proposed Separation - Disability and of your right to furnish affidavits in support of your reply.

A thorough review has been made of the reason for this action as contained in enclosure (1). After careful consideration of all available evidence, I find that the reason for this action is fully supported and sustained, and your separation is warranted. Since you did not reply, my decision is based on evidence of record.

6. Clearance. Your identification badge and all government tools and equipment charged to you must be returned and a clearance slip completed before any final monies due you may be issued.

7. Appeal Rights. Your rights to appeal this decision are contained in enclosure (2).

J. K. MUNNELEY

APPEAL RIGHTS

You may appeal at any time after receipt of this decision but not later than twenty (20) calendar days after the effective date of the action. Your right of appeal is as follows:

You may appeal to the Merit Systems Protection Board (MSPB), San Francisco Field Office, 525 Market Street, San Francisco, California 94105. The appeal shall be in writing and shall set forth your reasons for contesting the adverse action, with such proof and pertinent documents as you are able to submit. You should also indicate whether or not a hearing is desired. The attached form is provided for your convenience however, you are not required to utilize the form.

The decision of MSPB is final. However, either party to the appeal may petition MSPB to reopen and reconsider the decision.

If you have questions concerning your appeal rights and the appeal procedure, you should contact Carolyn Biddinger, Code 02C, extension 2122 or 4417.

ENCLOSURE 1 2

ORIGINAL

RECEIVED
MAR 27 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 83-5954

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

DAVID M. COHEN
WILLIAM G. KANTER
ROBERT A. REUTERSHAN
Attorneys

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has jurisdiction under 5 U.S.C. 7703 and 28 U.S.C. 1295 to review a decision of the Merit Systems Protection Board affirming the Office of Personnel Management's denial of an employee's application for disability retirement benefits.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-5954

WAYNE LINDAHL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 718 F.2d 391. The opinion of the Merit Systems Protection Board (Pet. App. 60a-69a) is unreported. The decisions of the Office of Personnel Management (Pet. App. 70a-75a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 8347 provides in pertinent part:

> (a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the

> Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.
>
> (b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.
>
> (c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

STATEMENT

1. On September 4, 1979, the Department of the Navy notified petitioner that it proposed to separate him from his civilian position because of his physical inability to perform the duties of his position (Pet. App. 84a-85a). Petitioner immediately filed an application with the Office of Personnel Management (OPM) for civil service disability retirement benefits (id. at 86a-87a). By letter dated September 17, 1979, the

Department of the Navy notified petitioner that, effective October 5, 1979, he would be removed from his position (id. at 88a-89a). The letter advised petitioner that he could challenge his removal by filing an appeal with the Merit Systems Protection Board (MSPB) (id. at 89a), but there is no indication that petitioner ever filed such an appeal.

On March 21, 1980, OPM denied petitioner's application for disability retirement benefits (Pet. App. 71a), and OPM sustained that denial on reconsideration because the evidence in the record failed to establish that he was disabled (id. at 72a-75a). Petitioner appealed OPM's reconsideration decision to the MSPB on January 9, 1981 (id. at. 60a). The MSPB presiding official held that petitioner had the burden of proving by a preponderance of the evidence that he had a disease or injury that rendered him totally disabled (id. at 61a-62a) and concluded after a thorough review of the evidence that petitioner had failed to carry this burden (id. at 62a-67a). Accordingly, the presiding official affirmed OPM's denial of petitioner's application for disability retirement benefits (id. at 67a).

2. On June 10, 1981, petitioner filed a petition for review of the MSPB decision in the United States Court of Claims. On October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25) (FCIA), the Court of Claims was abolished and this case was transferred to the docket of the newly established United States Court of Appeals for the Federal Circuit (Pet. App. 2a).

The court of appeals, sitting en banc, granted the government's motion to dismiss the appeal, concluding that it did not have jurisdiction under 5 U.S.C. 7703 to review the MSPB's decision. The court held that 5 U.S.C. 8347(c), which provides that determinations by OPM on questions of disability in connection with retirement applications are "final and conclusive

and are not subject to review," precludes all review of OPM disability determinations except for the administrative review by the MSPB that is expressly authorized by 5 U.S.C. 8347(c) and (d) (Pet. App. 4a-7a). The court also noted that Congress in 1980 had enacted a single narrow exception to this preclusion of review: 5 U.S.C. 8347(d)(2) allows an employee to obtain judicial review in the court of appeals pursuant to 5 U.S.C. 7703 if he was found disabled by the MSPB on the basis of his mental condition in a case in which the agency, rather than the employee, had filed the application for disability benefits. In the court's view, this exception provided compelling evidence that Congress intended to foreclose a right of judicial review on questions of disability in all other cases (id. at 7a). Because petitioner did not fall within this limited exception, the court held that judicial review was not available (id. at 8a).

The court of appeals recognized that its predecessor, the Court of Claims, had held in Scroggins v. United States, 397 F.2d 295, cert. denied, 393 U.S. 952 (1968), and subsequent decisions brought under the Tucker Act (28 U.S.C. 1491) that, notwithstanding the finality clause in 5 U.S.C. 8347(c), the Court of Claims could set aside a Civil Service Commission ruling on disability where there had "been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination" (Pet. App. 9a-10a, quoting 397 F.2d at 297). The court explained, however, that those decisions dealt with retirement that was forced by the agency, rather than a voluntary retirement by the employee (id. at 10a). The court further explained that if Scroggins and its Court of Claims progeny were read to hold that 5 U.S.C. 8347(c) leaves room for judicial review of voluntary disability retirement claims, those decisions "to that extent would have to be viewed as wrongly

decided and overruled" (Pet. App. 11a). In the court's view, to hold that MSPB decisions on disability questions generally are subject to judicial review pursuant to 5 U.S.C. 7703 "would be to render superfluous" Congress's action in enacting 5 U.S.C. 8347(d)(2) in 1980 explicitly to provide for judicial review pursuant to 5 U.S.C. 7703 in the limited category of cases involving a finding of mental disability where the agency, not the employee, had filed the application (Pet. App. 19a).

Judge Nichols filed a concurring opinion (Pet. App. 24a-29a). He stressed that in United States v. Erika, Inc., 456 U.S. 201 (1982), this Court had reversed a Court of Claims decision that had employed the rationale of Scroggins to permit review of certain aspects of a claim for benefits under Part B of the Medicare Program notwithstanding Congress's preclusion of review of the amount of benefits under Part B (see Erika, Inc. v. United States, 634 F.2d 580, 587 (Ct. Cl. 1980)). Judge Nichols reasoned that this Court's decision in Erika indicated that the express bar in 5 U.S.C. 8347(c) to judicial review of MSPB decisions on questions of disability likewise could not be avoided under the Scroggins rationale permitting review of legal or procedural, but not factual, issues (Pet. App. 32a-33a). Judge Nichols also noted that the Court of Claims itself had not applied Scroggins to avoid the comparable statutory bar in 38 U.S.C. 211(a) to the judicial review of decisions on claims for veterans benefits, and that this Court had recognized a right of judicial review notwithstanding this bar only where the plaintiff challenged the constitutionality of a veterans benefits statute (Pet. App. 31a, citing Johnson v. Robison, 415 U.S. 361 (1974)).

Judge Nies also filed a concurring opinion. She was of the view that all judicial review on the question of disability is "clearly precluded" by 5 U.S.C. 8347(c) and, in addition, that no aspect of a decision denying an application for disability benefits could be reviewed directly in the Federal Circuit pursuant to 5 U.S.C. 7703, except in the involuntary mental disability retirement cases covered by 5 U.S.C. 8347(d)(2) (Pet. App. 40a).

Four judges dissented, concluding that review of voluntary disability retirement claims should be available under the Scroggins formula notwithstanding the preclusion of review in 5 U.S.C. 8347(c) (Pet. App. 41a-57a).

ARGUMENT

The decision of the court of appeals is correct. Although several other courts of appeals have reached a contrary conclusion, the conflict of rulings on the reviewability under 5 U.S.C. 7703 of administrative disability determinations in connection with applications for civil service retirement benefits is of no continuing importance, because Congress has now provided that the court below has exclusive jurisdiction over petitions for review of MSPB decisions. This Court recently denied certiorari in a closely related civil service disability retirement case from the Federal Circuit in which a similar divergence of appellate rulings was of no continuing importance for the same reason. See Frank v. OPM, No. 83-5914, cert. denied (March 19, 1984)). There is no occasion for a different disposition here. Review by this Court therefore is not warranted.

1.a. The text of the Civil Service Retirement Act establishes that the court of appeals did not have jurisdiction under 5 U.S.C. 7703 in this case. OPM is directed by statute to

administer the civil service retirement program generally and to adjudicate all claims for benefits under that program. 5 U.S.C. 8347(a) and (b). The latter responsibility extends to the determination of all issues that bear on a claim for benefits, including whether the employee has completed the requisite years of service, computation of the amount of the annuity, etc. In addition, 5 U.S.C. 8347(c) specifically provides that OPM "shall determine questions of disability and dependency" arising under the retirement program and that "[e]xcept to the extent provided under subsection (d)" of 5 U.S.C. 8347, "the decisions of [OPM] concerning these matters are final and conclusive and are not subject to review." Subsection (d)(1) in turn provides that an administrative action or order affecting the rights of an individual or of the United States under the retirement program may be appealed to the MSPB under procedures prescribed by the MSPB. This subsection does not, however, provide for judicial review of a decision by OPM or the MSPB that the applicant is not disabled.

Under the statutory scheme, then, OPM's decisions on questions of disability are "final and conclusive and are not subject to review," except for administrative review of OPM's decision by the MSPB. Congress thus explicitly has foreclosed judicial review of an administrative determination that an applicant for retirement benefits is not disabled. In this case, petitioner's application for retirement benefits was denied by OPM and the MSPB because he was found not to be disabled. As the court of appeals recognized (Pet. App. 6a-7a), petitioner's attempt to seek judicial review of that administrative determination falls squarely within the statutory bar in 5 U.S.C. 8347(c).

This conclusion is consistent with this Court's decision in Johnson v. Robison, 415 U.S. 361 (1974), which construed the

parallel statutory bar in 38 U.S.C. 211(a) to judicial review of decisions of the Veterans Administration on applications for veterans benefits. Section 211(a), like 5 U.S.C. 8347(c), provides that the administrative determination is "final and conclusive" and shall not be subject to review. This Court recognized in Johnson v. Robison that Congress had foreclosed judicial review of individual benefit claims because of the wide variety of medical, legal, and other technical questions that often are involved and because of the need to ensure adequate and uniform resolution of these questions without expensive and time-consuming litigation. 415 U.S. at 370-373 & n.12. These same considerations underlie the bar to judicial review of the often complex medical, legal, and other questions relating to a determination of disability under the civil service retirement system. 1 / In contrast, where Congress has wished to provide for judicial review of questions of disability under federal

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1 / The Court held in Johnson v. Robison that 38 U.S.C. 211(a) does not preclude a judicial challenge to the constitutionality of a veterans benefits statute. 415 U.S. at 366-374. Similarly here, petitioner attempts to avoid the parallel preclusion of review in 5 U.S.C. 8347(c) by challenging the decisions of OPM and the MSPB on constitutional grounds. This attempt is without merit. As an initial matter, petitioner does not challenge the constitutionality of the civil service retirement statute; he challenges administrative actions under it. And even those challenges are wholly insubstantial.

Petitioner first contends (Pet. 8) that the Department of the Navy failed to follow a Federal Personnel Manual provision (FPM 831-1, S10-10a(6)) requiring that an employee be kept in pay status pending a ruling on an application for disability benefits. However, the provision petitioner cites applies only where the agency has filed the application for disability benefits (Pet. App. 80a, 83a); here, petitioner filed the application. In any event, if a particular regulation is not itself mandated by the Constitution, as the Federal Personnel Manual provision petitioner cites clearly is not, a violation of that regulation does not rise to the level of a constitutional violation. United States v. Caceres, 440 U.S. 741, 751-752 (1979); Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 n.8 (1978). Petitioner's other contention -- that it was unconstitutional for OPM and the MSPB to place on him the burden of proving his entitlement to disability benefits (see Pet. 8-10) -- is equally without merit. See Mathews v. Eldridge, 424 U.S. 319, 336 (1976).

benefits programs -- e.g., as under the Social Security disability program -- it has expressly so provided. See 42 U.S.C. (& Supp. V) 421(d) and 405(g). Indeed, as we now explain, Congress has expressly provided for such review pursuant to 5 U.S.C. 7703 in one narrow category of disability cases under the civil service retirement program itself, thereby reinforcing the conclusion that such review is barred in all other cases where Congress has not expressly so provided.

b. In 5 U.S.C. 8347(d)(2), enacted in 1980, 2 / Congress provided an exception to the general rule barring judicial review of questions of disability under the civil service retirement program. Under this newly enacted Paragraph (2), if OPM has found an individual to be disabled "in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement * * *, the procedures under [5 U.S.C. 7701] shall apply and the decision of the Board shall be subject to judicial review under [5 U.S.C. 7703]" (emphasis added). In this case, the application for disability benefits was filed by petitioner, not the Department of the Navy, and it was based on an alleged physical, not mental, disability. For these reasons, this case clearly does not fall within the authorization in 5 U.S.C. 8347(d)(2) for judicial review pursuant to 5 U.S.C. 7703. The fact that Congress expressly authorized judicial review pursuant to 5 U.S.C. 7703 in that one narrow category of cases "provides persuasive evidence that Congress deliberately intended to foreclose" judicial review pursuant to 5 U.S.C. 7703 in all other cases, such as that involved here. United States v. Erika, Inc., 456 U.S. 201, 208 (1982). Section 8347(d)(2) thereby reinforces the conclusion indicated by the preclusion of

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2 / Pub. L. No. 96-500, 94 Stat. 2696.

review in 5 U.S.C. 8347(c): the court of appeals did not have jurisdiction in this case under 5 U.S.C. 7703 to review the determination by OPM and the MSPB that petitioner was not disabled.

The logic and purpose of the narrow exception in 5 U.S.C. 8347(d)(2) further reinforces this conclusion. Section 8347(d)(2) states that the procedures in 5 U.S.C. 7701 for review by the MSPB and in 5 U.S.C. 7703 for judicial review of the MSPB's decision shall be followed in the agency-filed, mental disability cases. Sections 7701 and 7703 are contained in Subpart F of Title 5, entitled "Labor-Management and Employee Relations." The formal administrative review procedures in 5 U.S.C. 7701 3 / were intended to apply to actions taken against an employee arising out of those relations, such as a suspension, removal, or reduction in grade. Section 8347, in contrast, appears in Subpart G of Title 5, entitled "Insurance and Annuities." Unlike in an adverse action and other matters typically covered by Section 7701, it is the employee who ordinarily initiates the proceedings under Section 8347 by filing an application for benefits. The two sections therefore deal with quite different subject matters, and it is not surprising that Congress would provide for distinct review mechanisms in the two settings. See Dawson v. MSPB, 712 F.2d 264, 268-269 (7th Cir. 1983); Lancellotti v. OPM, 704 F.2d 91, 95-96 (3d Cir. 1983).

The congressional directive in 5 U.S.C. 8347(d)(2) that the procedures in Section 7701 nevertheless be followed in one

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3 / Under 5 U.S.C. 7701(a), the employee is entitled to an evidentiary hearing before the MSPB or a Board representative, for which a transcript will be kept, and to be represented by an attorney or other representative. Under 5 U.S.C. 8347(d)(1), in contrast, review of civil service retirement matters by the MSPB is pursuant to whatever "procedures [are] prescribed by the Board."

limited category of retirement cases is consistent with this scheme. Section 8347(d)(2) provides for appeal to the MSPB pursuant to the formal procedures in Section 7701 not where OPM has found that the applicant is not disabled, as in the present case. Rather it applies where OPM has found that the individual is disabled, because of his mental condition, and only where the application was filed by the agency, not the employee. Especially in light of the stigma that may attach to an agency allegation -- and OPM finding -- that an employee has a mental disability, such a situation closely resembles an adverse action of the type generally covered by 5 U.S.C. 7701(a). Moreover, the legislative history notes that 5 U.S.C. 8347(d)(2) was enacted "to protect the rights of individuals" because of a perceived abuse of such "involuntary, agency-initiated disability retirements" in order "to force unproductive or otherwise problem employees out of active service" (S. Rep. 96-1004, 96th Cong., 2d Sess. 2 (1980)). See also id. at 5; H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 5 (1980). It is consistent with this perception for Congress to require that the formal administrative procedures in 5 U.S.C. 7701 be followed in this sensitive area and also to provide the same opportunity for judicial review pursuant to 5 U.S.C. 7703 as is available when an adverse action is taken against an employee. These policy considerations simply do not obtain where, as here, the employee files the application for retirement benefits based on an alleged physical disabilty.

c. It is true that the Court of Claims previously had held in suits brought under the Tucker Act (28 U.S.C. 1491) that, notwithstanding the bar to judicial review in 5 U.S.C. 8347(c), it could review administrative denials of disability benefits to the extent of determining whether there had "been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart

of the administrative determination." See Scroggins v. United States, 397 F.2d 295, 297, cert. denied, 393 U.S. 952 (1968). However, for a number of reasons, the Federal Circuit correctly declined to rely on Scroggins to justify judicial review here.

First, the court of appeals' decision in this case concerns only the availability of judicial review of an MSPB decision directly in the Federal Circuit pursuant to the special statutory review procedure in 5 U.S.C. 7703(a) and (b). The court expressly declined to address the distinct question whether jurisdiction would lie under the Tucker Act to decide whether petitioner's disability entitled him to an annuity, explaining that this question was for the Claims Court to determine in the first instance. Pet. App. 8a n.1; see Pub. L. No. 97-164, §133(a), 96 Stat. 39, to be codified at 28 U.S.C. 1491(a)(1). Only if the Claims Court holds that jurisdiction does not lie under the Tucker Act and the Federal Circuit affirms that holding [4] would this Court be confronted with the question whether judicial review of civil service disability determinations is available in any circumstances under the Scroggins rationale.

Second, the Scroggins line of cases in the Court of Claims involved forced retirements of the employee by the agency because of disability and had its origins in cases in which the agency, not the employee, filed the application for disability

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[4] The Federal Circuit has exclusive jurisdiction of an appeal from a final decision of the Claims Court. Pub. L. No. 97-164, §127(a), 96 Stat. 37, to be codified at 28 U.S.C. 1295(a)(3). A Tucker Act suit also could be brought in federal district court pursuant to 28 U.S.C. 1346(a)(2) if the amount in controversy did not exceed $10,000, but exclusive appellate jurisdiction in such a case likewise would lie in the Federal Circuit. Pub. L. No. 97-164, §127(a), 96 Stat. 37, to be codified at 28 U.S.C. 1295(a)(2).

benefits. 5 / For this reason, as the court below recognized (Pet. App. 11a), the Scroggins line of cases does not warrant a broad assertion of jurisdiction to review all MSPB decisions on civil service disability issues, as petitioner apparently urges. See Pet. 11, 14, 15-16. In addition, as the court of appeals also observed, the concern that apparently led to the Court of Claims' initial application of the Scroggins formula -- i.e., "that administrators might unfairly force individuals from federal employment with an attached mental condition 'stigma'" -- has now "been fully met by Congress' enactment of [5 U.S.C.] 8347(d)(2)," which provides for formal administrative and judicial review in such cases pursuant to 5 U.S.C. 7701 and 7703. Pet. App. 11a. Because Congress thus has demonstrated that it will fashion an explicit exception to the bar to judicial review in 5 U.S.C. 8347(c) where it believes that judicial review is warranted, the court below properly declined to follow Scroggins as a basis for judicial review pursuant to 5 U.S.C.

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5 / See Gaines v. United States, 158 Ct. Cl. 497, 500-502 (Ct. Cl.), cert. denied, 371 U.S. 936 (1962); Scroggins v. United States, 397 F.2d at 297; McGlasson v. United States, 397 F.2d 303, 307 (Ct. Cl. 1968); McFarland v. United States, 517 F.2d 938, 942-943 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); Allen v. United States, 571 F.2d 14, 17 (Ct. Cl. 1978); Fancher v. United States, 588 F.2d 803, 806 (Ct. Cl. 1978); Polos v. United States, 621 F.2d 385, 391-392 (Ct. Cl. 1980). In the first four cases, the agency actually filed the application for disability benefits, which was approved by the Civil Service Commission; the employee, contending that he was not disabled and therefore should not have been retired, sought to recover the difference between back pay for the position and the disability retirement benefits. In the latter three cases, the employee filed an application for disability retirement benefits after the agency terminated his employment because he was unable to perform his duties. In Fancher and Polos, the separated employee sought to recover either back pay (on the theory that he was improperly terminated) or retirement benefits (on the theory that his application for retirement benefits was improperly denied). In Allen, the separated employee ultimately did not challenge his termination and sought to recover only the difference between the discontinued service annuity he was awarded and the disability annuity he sought.

7703 where Congress itself has chosen not to provide an exception to the preclusion of review in 5 U.S.C. 8347(c). 6 /

Third, as Judge Nichols observed in his concurring opinion (Pet. App. 32a-33a), this Court's decision in United States v. Erika, Inc., firmly supports the Federal Circuit's determination not to follow Scroggins here. The Court held in Erika that judicial review of benefit amount determinations under Part B of the Medicare Program is foreclosed, relying upon Congress's express provision in 42 U.S.C. 1395ff(b) for judicial review under the Part A Medicare Program and its omission of any such provision under Part B. 456 U.S. at 206-208. In reaching this conclusion, the Court reversed the holding of the Court of Claims that this "implicit" preclusion of review barred judicial review only of factual determinations, not statutory or procedural challenges to the administrative decision. Erika, Inc. v. United States, 634 F.2d 580, 585-586 (1980). See 456 U.S. at 205. Significantly, moreover, the Court of Claims in Erika relied upon the Scroggins line of cases under the Civil Service Retirement Act that permitted review of statutory or procedural issues notwithstanding the explicit preclusion of review in 5 U.S.C. 8347(c). See 634 F.2d at 587. Against this background, this Court's unanimous reversal of the Court of Claims' holding in

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6 / The House Report on the 1980 amendment does discuss the Court of Claims' decisions in Scroggins, McGlasson, and McFarland. See H.R. Rep. 96-1080, 96th Cong., 2d Sess. 8 (1980). All three of those cases, however, arose under the Tucker Act and involved agency-filed applications based on mental disability. Congress enacted the special provision for judicial review pursuant to 5 U.S.C. 7703 in such situations, thereby superseding any separate basis for review in a suit brought pursuant to the general jurisdictional grant in the Tucker Act. Congress's failure to provide for review under 5 U.S.C. 7703 in other circumstances indicates that it did not intend for a disappointed applicant for disability benefits, such as petitioner, to obtain review under 5 U.S.C. 7703 as well; if review already was available pursuant to Section 7703, the 1980 amendment would have been unnecessary. The continued vitality of the Scroggins rationale for limited review in other cases brought under the Tucker Act is not at issue here. Petitioner's contentions (Pet. 13-14) that Congress understood in 1980 that limited judicial review was available in the Court of Claims under Scroggins therefore is irrelevant.

Erika substantially undermines the Scroggins rationale for avoiding the explicit preclusion of review of disability determinations under the Civil Service Retirement Act. See Hackett v. OPM, 721 F.2d 580, 582 (6th Cir. 1983) ("The Scroggins rule has been eroded considerably, if not completely, by the decision in [Erika]"); Lancellotti v. OPM, 704 F.2d 91, 97 n.10 (3d Cir. 1983) ("Erika thus casts considerable doubt on the continued validity of Scroggins and its progeny").

2. A number of other courts of appeals likewise have held that the decisions by OPM and the MSPB on questions of disability are not subject to judicial review under 5 U.S.C. 7703. See Hackett v. OPM, 721 F.2d 580, 582 (6th Cir. 1983); Chase v. OPM, 695 F.2d 790, 791 (4th Cir. 1982); Campbell v. OPM, 694 F.2d 305, 306-308 (3d Cir. 1982); 7 / Morgan v. OPM, 675 F.2d 196, 198-200 (8th Cir. 1982). As petitioner points out (Pet. 15-16), a number of other courts of appeals have reached a contrary conclusion, relying upon Scroggins. See Pitzak v. OPM, 710 F.2d 1476, 1478-1479 (10th Cir. 1983); Turner v. OPM, 707 F.2d 1499, 1502-1503 (D.C. Cir. 1983); McCard v. MSPB, 702 F.2d 978, 981-983 (11th Cir. 1983); Parodi v. MSPB, 690 F.2d 731, 734-737 (9th Cir. 1982). This division of authority is of no continuing importance, however, because the regional courts of appeals no longer have jurisdiction to review decisions of the MSPB pursuant to 5 U.S.C. 7703.

Section 205 of the Civil Service Reform Act of 1978 (CRSA) (Pub. L. No. 97-164, 92 Stat. 1143) added the new Section 7703 to Title 5 to provide a special statutory procedure for judicial review of decisions by the MSPB, which assumed the adjudicatory functions of the Civil Service Commission. Section 206 of the CSRA amended 28 U.S.C. 2342 to grant jurisdiction to the regional courts of appeals and the Court of Claims to review MSPB

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7 / See also Lancellotti v. OPM, 704 F.2d 91, 95-97 (3d Cir. 1983).

decisions, with the exception of cases involving charges of discrimination, which are subject to trial de novo in district court. See 28 U.S.C. (Supp. V) 2342(6) and 5 U.S.C. (Supp. V) 7703(b). It was pursuant to this jurisdictional grant that the regional courts of appeals rendered the various decisions cited above.

However, in the Federal Courts Improvement Act of 1982 (FCIA) (Pub. L. No. 97-164, 96 Stat. 37, 45), Congress removed jurisdiction from the regional courts of appeals to review MSPB decisions pursuant to 5 U.S.C. 7703 and provided for exclusive jurisdiction over such actions in the United States Court of Appeals for the Federal Circuit. Pub. L. No. 97-164, 96 Stat. 37, 45, §144(1) (codified at 5 U.S.C. 7703(b)(1)) and §127(a) (to be codified at 28 U.S.C. 1295(a)(9)). Thus, the regional courts of appeals do not have jurisdiction over any petition for review under 5 U.S.C. 7703 filed after the October 1, 1982 effective date of the FCIA. 8 / Accordingly, the disagreement among the courts of appeals regarding the existence of jurisdiction under 5 U.S.C. 7703 to review decisions of OPM and the MSPB on questions of disability in civil service retirement cases is of no practical significance. For precisely this reason, the Court recently denied certiorari in another civil service disability retirement case in which there was a similar conflict of no continuing importance (Frank v. OPM, No. 83-5914, cert. denied, (Mar. 19, 1984)); there is no reason for a different result here. This is especially so since administrative decisions on disability issues were rarely set aside under the Scroggins standard in any event, and the availability of judicial review therefore was of limited value.

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8 / See Pub. L. No. 97-164, §402, 96 Stat. 57.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(1)

No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 5 U.S.C. § 8347(c), which states that decisions of the Office of Personnel Management on questions of disability and dependency are "final and conclusive and are not subject to review," precludes judicial review of these decisions.

2. Whether the Federal Courts Improvement Act vests exclusive jurisdiction in the United States Court of Appeals for the Federal Circuit to review civil service retirement matters under 5 U.S.C. § 7703.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-5954

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The National Association of Retired Federal Employees ("NARFE") submits this brief *amicus curiae* to urge that the Court grant certiorari and resolve the important questions presented by this case relating to the Civil Service Retirement Act, the Civil Service Reform Act of 1978, and the Federal Courts Improvement Act.

STATEMENT

The Civil Service Retirement Act ("Retirement Act"), 5 U.S.C. §§ 8331-8348, Pub. L. No. 66-215, 41 Stat. 614 (1920), as amended, provides specific entitlements to federal employees who have contributed to the retirement fund for a minimum of five years. The Retirement Act provides for several types of annuities, including, for example, immediate retire-

ment, deferred retirement and discontinued service retirement, for several different classes of federal employees, including members of Congress, government agency employees, and federal law enforcement officials. The Retirement Act also provides for disability retirement benefits for employees who have become permanently disabled from rendering useful and efficient service and who have contributed to the retirement fund for five or more years.

Petitioner Wayne Lindahl is a former federal employee, who, because his severe bronchitis rendered him unable to perform the duties of his position, was removed from federal service. Believing that he had a "disease or injury" which precluded him from "rendering useful and efficient service," and having contributed to the retirement fund for more than five years, Mr. Lindahl applied for a disability annuity. The Office of Personnel Management and ultimately the Merit Systems Protection Board ("MSPB") rejected his application for an annuity. Mr. Lindahl petitioned the Court of Claims for judicial review of the MSPB decision. The United States Court of Appeals for the Federal Circuit (successor to the Court of Claims), in an *en banc* decision, dismissed his petition on jurisdictional grounds, a plurality holding that 5 U.S.C. § 8347(c) precludes judicial review of voluntary disability retirement decisions. In so holding, the Federal Circuit overruled twenty years of its own precedents and acted contrary to the majority of the circuit courts that have addressed this issue and have held that judicial review of voluntary disability retirement decisions is available.

INTEREST OF NARFE

NARFE is a non-profit, incorporated association, having its principal place of business in Washington, D.C. From its original 14 charter members, NARFE has grown to a membership now approaching half a million federal annuitants (retirees and survivors) living throughout the 50 states, Puerto Rico, the Canal Zone, the Republic of the Philippines, and various foreign countries. The national membership is orga-

nized in more than 1600 local chapters and 50 state federations. NARFE ha been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades. Moreover, when significant legal issues concerning the retirement system have been raised by administrative or judicial action, NARFE has participated in, or itself initiated, litigation for the common good of its members.

This case, because it raises fundamental questions about the character and legal status of the annuity rights earned through federal employment and the role of the courts in enforcing those rights, directly implicates paramount interests of NARFE. It is for this reason that NARFE sought and obtained the permission of the parties to participate before the Court as *amicus curiae*.

REASONS FOR GRANTING THE PETITION

1. This case presents issues of substantial public importance. The decision below eliminates completely the traditional role of the courts in protecting federal employees against arbitrary denials of earned retirement benefits. In precluding judicial review of disability retirement matters, the court of appeals has misconstrued the applicable statutory requirements and acted contrary to twenty years of precedent of its predecessor court.[1] It has also rejected the holdings of a majority of the courts of appeals that have addressed the issue and have concluded that judicial review is available.

Beyond this, the Federal Circuit's decision itself is a plurality ruling that reflects substantial differences among the judges of that court. Chief Judge Markey, writing for himself and four other judges, concluded that no judicial review was

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[1] *See Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962); *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980).

available whatsoever. *Lindahl* v. *Office of Personnel Management*, 718 F.2d 391, 400 (Fed. Cir. 1983). Judge Nichols separately concurred, concluding, however, that review is available for "unconstitutional and void determinations, where Congress could not reasonably, in light of history, have expected the preclusion to be effective." *Lindahl*, 718 F.2d at 405. Judge Nies also concurred separately, writing that not "all aspects of a disability claim are precluded from review." *Id.* Four judges dissented, concluding that Congress did not intend to preclude judicial review. Thus, six of the eleven judges would allow some review, although the contours of this review are not clear.[2]

2. Since the enactment of the Civil Service Reform Act in 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), several circuit courts have considered the effect of the limiting language of 5 U.S.C. § 8347(c).[3] The Ninth, Eleventh, District of Columbia and Tenth Circuits have all allowed judicial review of disability retirement decisions,[4] while the Federal, Fourth and Eighth

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[2] The Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 39 (1982), vested exclusive jurisdiction in the Federal Circuit to hear cases arising under 5 U.S.C. § 7703. *Lindahl* determined, however, that disability retirement matters are not § 7703 appeals. According to the decision, even if judicial review of such matters were not precluded, review would not lie in the Federal Circuit.

[3] In pertinent part, 5 U.S.C. § 8347 provides:

> (c) The Office shall determine questions of disability and dependency arising under this subchapter. The decisions of the Office concerning these matters are final and conclusive and are not subject to review. . . .
>
> (d) An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

[4] *See Parodi* v. *Office of Personnel Management*, 690 F.2d 731 (9th Cir. 1982); *McCard* v. *Merit Systems Protection Board*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *Office of Personnel Management*, 707 F.2d 1499 (D.C. Cir. 1983); *Pitzak* v. *Office of Personnel Management*, 710 F.2d 1476 (10th Cir. 1983).

Circuits have held that no review is available.[5] The Third Circuit epitomizes the confusion surrounding this issue. One case, following the Eighth Circuit ruling in *Morgan* v. *Office of Personnel Management*, 675 F.2d 196 (8th Cir. 1982), was dismissed on jurisdictional grounds.[6] A subsequent case, however, was considered on the merits and the court held that it was only precluded from reviewing the "factual determinations" of disability.[7]

Squarely framed, the question that has divided the circuits is whether the finality provision of 5 U.S.C. § 8347(c) precludes or merely limits judicial review of disability retirement matters. The Ninth Circuit and the District of Columbia Circuit, particularly, have held that this language affects the *standard* rather than the availability of review. *Parodi* v. *Merit Systems Protection Board*, 690 F.2d 731, 735 (9th Cir. 1982); *Turner* v. *Office of Personnel Management*, 707 F.2d 1499, 1504 (D.C. Cir. 1983). The Federal Circuit has rejected these decisions for what the plurality termed the "sounder conclusion" that § 8347(c) operates as an absolute bar to judicial review. *Lindahl*, 718 F.2d at 386.

In the Federal Circuit plurality's view, it "is difficult to conceive of a more clear-cut statement of congressional intent to preclude review" than § 8347(c). *Lindahl*, 718 F.2d at 393.[8] While the starting point for discerning congressional intent is

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[5] *See Henderson* v. *Office of Personnel Management*, 724 F.2d 119 (Fed. Cir. 1983) (extending the *Lindahl* holding to cases of involuntary retirement); *Chase* v. *Office of Personnel Management*, 695 F.2d 790 (4th Cir. 1982); *Morgan* v. *Office of Personnel Management*, 675 F.2d 196 (8th Cir. 1982).

[6] *See Campbell* v. *Office of Personnel Management*, 694 F.2d 305 (3d Cir. 1982).

[7] *See Lancellotti* v. *Office of Personnel Management*, 704 F.2d 91, 97 (3d Cir. 1983).

[8] *But see* 5 U.S.C. § 8128 (1982), concerning worker's compensation benefits, which provides that administrative decisions are "final and conclusive for all purposes and with respect to all questions of law and fact" and "not

the statutory language, *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), the presumption favoring judicial review of administrative action is not easily overcome and will not be rebutted unless there is "persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967); *see Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). Thus, as a general rule, a statute will not be construed to restrict access to judicial review absent "clear and convincing evidence" of congressional intent to do so. *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974). This presumption of reviewability is especially strong where, as here, "definitive personal rights are created by federal statute, similar in kind to those customarily treated in courts of law." *Stark* v. *Wickard*, 321 U.S. 288, 309 (1944).

There is no "clear and convincing" evidence here that Congress intended to preclude all judicial review of disability retirement matters. Indeed, the evidence is to the contrary. The decisions in *McCard*, *Turner* and *Parodi* set out the reported legislative history pertaining to § 8347(c), particularly its 1980 amendment,[9] and conclude that Congress acted to *broaden*, not limit, access to judicial review. Thus, at a minimum there is an uncertainty on this score. The existence of this uncertainty, and the Federal Circuit's failure to resolve it in favor of allowing judicial review, *Abbott Laboratories*, 387 U.S. at 140; *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975), both suggest that consideration by this Court is warranted.[10]

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subject to review by another official of the United States or by any court by mandamus or otherwise." *See also* 38 U.S.C. § 211(a) (1982) (similar nonreviewability language for veterans benefits).

[9] Pub. L. No. 96-500, 94 Stat. 2696 (1980).

[10] It cannot be claimed that the palpable split among the circuits is moot because the Improvement Act vests exclusive review of MSPB decisions in the Federal Circuit. Indeed, the *Lindahl* decision itself negates any such contention because six of the eleven judges acknowledge that there is review in some court, if not the Federal Circuit. *See* note 2, *supra*. Thus, the issues of reviewability and the dimensions of review will recur in the other circuits and those rulings contrary to *Lindahl* will continue to have vitality.

3. Review by this Court is especially appropriate here because the decision below departs from the well-established principle that an administrative agency's construction of the statutes which it is charged with administering is due substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *United States* v. *Rutherford*, 442 U.S. 544, 553 (1979). The Merit Systems Protection Board has consistently held, even prior to the adoption of the 1980 amendment, that it hears disability retirement matters under 5 U.S.C. § 7701. *See Hein* v. *Office of Personnel Management*, 1 MSPB 396 (1980); *Chavez* v. *Office of Personnel Management*, 6 MSPB 343 (1981). Hence, the Board has regularly advised unsuccessful applicants of their right to seek judicial review under § 7703. *See Turner*, 707 F.2d at 1504; Petitioner's Appendix at 68a. The Federal Circuit, without warrant, failed to accord the Merit Systems Protection Board's views the deference they were due.

4. Review by this Court is also warranted because the interpretation of the retirement laws adopted by the court below raises serious constitutional issues that can and should be avoided. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 149 (1979); *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). The Federal Circuit improperly dismissed any constitutional concerns by characterizing retirement benefits as gratuities that did not rise to the level of property protected by the Fifth Amendment. *Lindahl*, 718 F.2d at 392; *id.*, 718 F.2d at 397. It is, however, axiomatic that federal employees have protected property interests in their compensation, and that retirement annuities are part of this compensation. *Kizas* v. *Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983). In view of this, the Federal Circuit's decision cutting off all access to judicial review of disability retirement disputes raises serious constitutional questions. *See Guam* v. *Olsen*, 431 U.S. 195, 204 (1976); *Ortwein* v. *Schwab*, 410 U.S. 656, 665-66 (1973) (Marshall, J. dissenting); *Id.*, 410 U.S. at 661, 662-63 (Douglas, J.

dissenting); *Ralpho* v. *Bell*, 569 F.2d 607, 619 (D.C. Cir. 1977). This Court has admonished the lower courts to avoid these constitutional dilemmas when it is possible to do so. The constitutional issues presented here could easily have been avoided, since it can hardly be said that the construction endorsed by the court below was unambiguously mandated. That court's failure to heed the admonition against unnecessarily raising constitutional conflicts is another reason supporting review by this Court.

5. The Federal Courts Improvement Act created the Federal Circuit to provide uniformity and special expertise in certain areas, including civil service matters. To this end, Congress provided that exclusive review of all cases arising under 5 U.S.C. § 7703(b)(1) and (d) was to be in the Federal Circuit. 28 U.S.C. § 1295(a)(9). In the decision below, however, the Federal Circuit determined that its jurisdiction under § 7703 does not include review of voluntary disability retirement decisions. This holding defeats the clear purpose of the Improvement Act and invites multi-circuit judicial review of this one class of Merit Systems Protection Board cases.

The legislative intent behind the Improvement Act is unambiguous. Concerned that prompt and definitive answers to legal questions of nationwide significance were often unavailable, Congress sought to reorganize the appellate structure of the federal courts. Finding particular areas of the law especially lacking in national uniformity, Congress acted to create an appellate court whose jurisdiction was based on subject matter, rather than geographic distinctions. *See* S. Rep. No. 275, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 11. Important here is Congress' decision to provide the new court with exclusive jurisdiction to review final decisions of the Merit Systems Protection Board. 28 U.S.C. § 1295(a)(9).

Notwithstanding this clear legislative purpose, the Federal Circuit has how determined that final MSPB decisions on disability retirement matters are not appealable under § 7703, either by claimants or by the Office of Personnel Management.

Lindahl, 718 F.2d at 399; *Henderson* v. *Office of Personnel Management*, 724 F.2d 119 (Fed. Cir. 1983). Thus, for example, while 5 U.S.C. § 7703(d) provides that "[t]he Director of the Office of Personnel Management may obtain review of *any* final order of the Board" (emphasis added), the Federal Circuit concludes that it is not the proper court to entertain any such petition for review if it involves disability retirement. *See Lindahl*, 718 F.2d at 405 (Nies, J. concurring).[11] The Federal Circuit has artificially restricted its jurisdiction to consider only some appeals of Merit Systems Protection Board decisions, presumably leaving resolution of others to the district courts.

By declining to hear disability retirement cases, the Federal Circuit has contravened two acts of Congress that were specifically designed to rectify perceived problems with judicial review of civil service cases.[12] Rather than assist in the resolution of these problems by ensuring that all civil service cases be reviewed in a single court (as contemplated by the Improvement Act), and directly at the appellate level without an intervening record review in the district court (a requirement of the Reform Act), the decision below undermines both purposes and adds confusion to the area.

The Federal Circuit was intended to be the only circuit level court with jurisdiction to hear appeals from the Merit Systems Protection Board. It was created specifically to provide nation-

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[11] It is especially significant here that six of the eleven judges believe that some form and degree of review remains available. *Lindahl* holds, however, that this review is not available in the Federal Circuit. *See also Henderson* v. *Office of Personnel Management*, 724 F.2d at 120-21.

[12] One of the most significant changes made by the Civil Service Reform Act was to provide for judicial review in the courts of appeals "incorporating the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies." H. R. Rep. No. 1717, 95th Cong., 2d Sess., 143, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2876. *See also Polcover* v. *Department of Treasury*, 477 F.2d 1223, 1225-26 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973).

al uniformity and to relieve other courts of the burden of determining complex questions of law arising in certain subject matter areas, including the federal personnel area. *See* S. Rep. No. 275, *supra*, at 3, 1982 U.S. Code Cong. & Ad. News at 13. Paradoxically, in the name of zealously "avoiding the unauthorized jamming of the courthouse door," *Lindahl*, 718 F.2d at 396, the court has negated the clearly expressed congressional purpose and has also ensured that the doors of other courts will be "jammed" with cases that Congress wanted the Federal Circuit to hear.

The propriety of the Federal Circuit's restrictive determination of its jurisdiction contrary to clear congressional intent presents an important question of federal law which should be answered by this Court. It is an especially important question now, arising as it does in the Federal Circuit's formative stages.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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QUESTION PRESENTED

Whether the United States Court of Appeals has jurisdiction pursuant to 5 U.S.C. § 8347, 5 U.S.C. § 7703 and judicial precedent to review decisions of the Office of Personnel Management and the Merit Systems Protection Board regarding disability retirement applications other than those initiated by an employing agency on the basis of an individual's mental condition.

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BRIEF AMICUS CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE) files this brief as amicus curiae in support of Petitioner Wayne Lindahl in this action.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees (AFGE) is a labor organization affiliated with the AFL-CIO. AFGE represents approximately 700,000 civilian employees of the federal government in the United States and overseas. AFGE is the largest labor organization of non-postal federal employees including the so-called blue

collar, white collar and professional groups of employees situated in nearly every major department and agency of the Federal government. In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances, initiates court actions, and carries on legislative activity to enhance the welfare of the employees it represents. AFGE has previously initiated or participated in judicial action involving retirement issues and entitlements of its members.

The United States Court of Appeals for the Federal Circuit in an *en banc* decision in *Lindahl* v. *Office of Personnel Management*, 718 F.2d 391 (Fed. Cir. 1983) held that the disability retirement statute precluded judicial review of a Merit Systems Protection Board (MSPB) decision affirming the denial by the Office of Personnel Management (OPM) of a former federal employee's application for disability retirement.

The Federal Circuit's decision has an impact on hundreds of its members, who will have no access to the Federal Circuit for review of certain disability retirement decisions of OPM and the MSPB in cases pending before these administrative agencies or where future applications will be submitted. Because of the Federal Circuit's restrictive reading of the disability retirement statute there are serious implications for withholding of their jurisdiction in other cases arising under similar statutes.

AFGE is committed to the protection of constitutional and statutory rights of federal employees and to challenging actions which infringe upon these rights. In this regard AFGE has a direct and compelling interest in assuring that the Federal Circuit assert some form of review authority over OPM and MSPB decisions, where such decisions implicate important disability retirement entitlements.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Wayne Lindahl is a former federal employee who was removed from federal service because his severe bronchitis rendered him unable to perform the duties of his position. Pursuant to the terms of the Civil Service Retirement Act, 5 U.S.C. §§ 8331-8348, Petitioner immediately thereafter applied for a disability annuity.

In an application to OPM, the Petitioner, who had contributed to the retirement fund for more than five years, alleged that he had a disease or injury which precluded him from rendering useful and efficient service in the grade or class of position he last occupied. 5 U.S.C. § 8331(6), 5 U.S.C. § 8337. OPM, and the MSPB on review, denied his application for disability retirement. The United States Court of Appeals for the Federal Circuit, in an *en banc* decision, dismissed his petition on jurisdictional grounds, a plurality holding that 5 U.S.C. § 8347(c) precludes judicial review of voluntary disability retirement decisions.

5 U.S.C. §§ 8347(c) and (d) provide as follows:

> (c) The Office [OPM] shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office

> to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

By its holding the Federal Circuit has overruled over twenty years of its own precedents and acted contrary to the majority of the circuits that have addressed this issue.

In addition, the Federal Circuit has chosen to ignore the legislative history specifically recognizing an existing limited form of judicial review, and merely expanding the judicial review in certain types of disability retirement cases initiated by the Agency. Further, the Federal Circuit's decision operates contrary to this Court's pronouncement that absent clear and convincing evidence of Congressional intent to preclude the important right to judicial review, review must be granted.

ARGUMENT

I. There is No Clear and Convincing Evidence that Congress Intended to Preclude All Judicial Review of Disability Retirement Matters

The Federal Circuit asserts that the so-called "finality clause" in 5 U.S.C. § 8347(c) provides "unequivocally and unambiguously that administrative decisions on questions of disability are final and conclusive and are not subject to review." The Federal Circuit concludes "[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review . . ." 718 F.2d at 393.

The history of the disability retirement statutory scheme can be traced briefly as follows. The finality clause language relied on herein to preclude the Federal Circuit jurisdiction first appeared in relation to survivorship benefits in 1948 in 5 U.S.C. § 724 and was extended to include

disability cases in 1956, as codified at 5 U.S.C. § 2266. In 1978, Congress passed an amendment to the retirement statute, 5 U.S.C. § 8347, Pub L. No. 95-454 (Civil Service Retirement Act). That amendment again left intact the finality language with respect to OPM's decisions, (replacing the Civil Service Commission), although providing for access to an administrative review by the newly created MSPB. In 1980, Congress, concerned about potential for abuse and stigma occasioned by agency initiated disability retirement applications based on an individual's alleged mental condition, made additional amendments to the law. Senate Report No. 96-1004, 96th Cong. 2d Sess. (1980). House Report No. 96-1080, 96th Cong., 2d Sess. (1980). These amendments provided modifying language to the finality provision in 5 U.S.C. § 8347(c) by referencing subsection (d) and specified MSPB adherence to procedures under 5 U.S.C. § 7701 and the full scope of judicial review provided under 5 U.S.C. Section 7703 for review of MSPB decisions involving agency initiated disability retirement applications for mental conditions.

After journeying through a similar development of the disability retirement statute, the Federal Circuit concluded that "[u]ntil 1980, Congress had at no time specifically granted jurisdiction to any court to review any question, by either OPM or MSPB, on questions of disability and dependency." Although earlier acknowledging a paucity of legislative history concerning the origins of the finality provisions, the Federal Circuit rejects twenty years of precedence of its predecessor court, the presumption favoring judicial review of agency actions, and the legislative history accompanying the 1980 amendments by reliance on what it calls the "plain language of the statute." Although the finality language now contained in Section 8347(c) has been in existence since 1948, and has been consistently interpreted to provide for narrow judicial review, the Federal Circuit declares a clear statutory preclusion for review. Yet, the finality language of

Section 8347(c) has never been regarded as a complete bar to judicial review of decisions by OPM (or its predecessor Civil Service Commission) or the MSPB.

The Federal Circuit in its plurality opinion rejects the Supreme Court's declared presumption of judicial review over agency actions, finding 5 U.S.C. § 8347(c) to be an express preclusion of judicial review. 718 F.2d at 397.

While the scope of judicial review of administrative action may be specifically limited by statute, there is a presumption that an agency action is reviewable. Judicial review will be precluded only if Congress' intent to preclude such review is clear and convincing. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136(1967); *Barlow* v. *Collins*, 397 U.S. 166(1970); *Dunlop* v. *Bachowski*, 421 U.S. 560(1975); *Johnson* v. *Robison*, 415 U.S. 361(1974). This presumption of reviewability is especially strong where definitive personal rights are created by federal statute, such as retirement benefits, similar in kind to those customarily treated in courts of law. *Stark* v. *Wickard*, 321 U.S. (288(1944).

The language of 5 U.S.C. § 8347(c) does not provide clear and convincing evidence of a Congressional intent to bar all judicial review of disability determinations. *McCard* v. *MSPB*, 702 F.2d 978, 981 (11th Cir. 1983). The statute only evinces a congressional intent to bar judicial review of factual questions concerning disability and dependency. *Parodi* v. *MSPB*, 690 F.2d 731, 735 (9th Cir. 1982); *Turner* v. *OPM*, 707 F.2d 1499, 1502(D.C. Cir. 1983). It is possible to give effect to Congress' obvious intent to foreclose judicial review of the sufficiency of the medical evidence, yet preserve the generally recognized duty of the courts to require a governmental agency to follow the procedural and substantive framework established in the act the agency administers and to prevent the agency from violating constitutional rights. *Pitzak* v. *OPM*, 710 F.2d 1476, 1479 (10th Cir. 1983); *Dunlop* v. *Bachowski*, *supra*, 421 U.S. at 567.

In further support of this position that the finality clause of section 8347(c) is compatible with judicial review of MSPB disability decisions that are confined to procedural infirmities and irrational decision making is the juxtaposition of the finality clause with a statement immediately thereafter concerning OPM's determination of the facts. *Turner* v. *OPM*, *supra*, 707 F.2d at 1502. This clearly demonstrates that the finality clause in non-agency initiated disability retirement cases for mental conditions operates with respect to a review of the factual determinations only. While the Federal Circuit herein rejects this suggestion, without explanation, 718 F.2d at 397, such a view renders the finality clause language much more plausible than its interpretation.

The Federal Circuit plurality goes so far as to suggest that even where the OPM and MSPB act so irresponsibly and arbitrarily as to employ unacceptable interpretations of law, statutes or regulations, and totally inadequate procedures for the purpose of denying annuities to those who voluntarily retire, it could not exercise jurisdiction. 718 F.2d at 397. The Federal Circuit in this regard states that the right to retirement or a retirement annunity has no basis in the Constitution. 718 F. 2d at 392. The Court states that "one whose application for an annuity is denied after voluntary disability retirement is not by that denial alone deprived of a constitutional right. There being no liberty or fundamental pre-existing property interest at risk, the simplest procedures adopted by the agency will avoid a claim of denial of procedural due process." 718 F.2d at 397.

The Federal Circuit erroneously concluded that an employee who has met the minimum service and disability requirements does not have a legitimate property interest in entitlement to an annuity. Federal employees have protected property interests in these retirement annuities. *Kizas* v. *Webster*, 707 F.2d 524 (D.C. Cir. 1983); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548 (D.C. Cir. 1983). After an employee

serves five years of continuous employment and is found to be totally disabled, his/her entitlement to an annuity is a vested property right. The Federal Circuit's failure to acknowledge this property interest and abrogation of a means of enforcing it where there are serious procedural or legal deficiencies implicate constitutional and statutory rights. Action of the executive branch in violation of constitutional or statutory rights of a Petitioner is subject to judicial review. *Leedom* v. *Kyne*, 358 U.S. 184(1958); *American School of Magnetic Hearing* v. *McAnnulty*, 187 U.S. 94(1902); *Harmon* v. *Brucker*, 355 U.S. 579(1958). The concurring opinion of Judge Nichols recognizes the potential danger of extending the preclusion of judicial review "to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective." 718 F.2d at 405. Congress cannot deprive the federal courts of jurisdiction to review agency action that is in contravention of the Constitution, a federal statute, or regulation, even where there is a finality clause in the statute. *Schlesinger* v. *Councilmen*, 420 U.S. 738, 749(1975); *Pitzak* v. *OPM*, *supra*.

As will be developed further herein, Congress' continued acknowledgment of a line of cases permitting a narrow scope of review in the routine disability retirement cases, and expansion of that review to agency initiated disability retirements for mental condition, evinces a clear intent not to preclude all judicial review.

II. The Federal Circuit's Rejection of the "Scroggins" Line of Cases is Based Upon Artificial Distinctions Regarding Voluntary or Involuntary Nature of the Disability Retirement Application

In rendering its decision in this matter, the Federal Circuit presumes an unchartered body of judicial precedent in application of the finality clause in the statute. Unremarkable to the Federal Circuit is that the finality language in the disability retirement statute is in essence

identical to the language of the statute as it existed when its predecessor court established a definite, albeit narrow scope of judicial review. *Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936(1962); *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952(1968); *McGlasson* v. *United States*, 397 F.2d 303 (Ct. Cl. 1968); *McFarland* v. *United States*, 517 F.2d 938 (Ct. Cl. 1975); *cert. denied*, 423 U.S. 1049(1976); *Allen* v. *United States*, 571 F.2d 14 (Ct. Cl. 1978); *Fancher* v. *United States*, 588 F.2d 803 (Ct. Cl. 1978). In what has been designated as the "Scroggins formula," although having its genesis in *Smith* v. *Dulles*, 236 F.2d 739 (D.C. Cir. 1956), the Court of Claims determined that it could set aside the Civil Service Commission's (OPM's predecessor) decision where "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination."

The Federal Circuit discounts each and every one of these consistent Court of Claims decisions, by its assertion that "we face here no settled case law," in its finding that all of these cases dealt with forced retirements for mental conditions or physical disability. The distinction for review based upon the forced or voluntary nature of the disability retirement is not recognized in the body of judicial case law or legislative history. Further, the Federal Circuit's interpretation ignores the reality of this type of separation, and is contrary to their subsequent pronouncement on the identical treatment of these cases. If truly finding that the 1980 Amendment did not alter the previous finality provision, 718 F.2d at 400, the Federal Circuit offers no rational basis for overturning the precedence of the Court of Claims.

The holdings of the United States Court of Claims shall be binding as precedent upon the Federal Circuit, *South Corporation* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982). By creating a distinction not found in the provision of the statute relied upon by the court herein, 5 U.S.C.

§ 8347(c) (Nichols, concurring opinion, 718 F.2d at 400), nor the legislative history, the Court believes it sidesteps its repudication of the Court of Claims precedent. Yet as Judge Nichols (concurring) opines, the factual basis of the statement that Mr. Lindahl is a voluntary retiree is uncertain. After an employee such as Mr. Lindahl is terminated from employment for disability reasons, it can hardly be posited that his disability retirement application is voluntary. Under these circumstances, Judge Nichols prefers to assume that Mr. Lindahl's retirement was involuntary. 718 F.2d at 400.

More significantly, this Court in a panel comprised of the Chief Judge who issued the majority opinion in the instant case, subsequently determined in *Henderson* v. *Office of Personnel Management*, 724 F.2d 119(Fed. Cir. 1983) that there is no legal reason for application of a different rule from Lindahl, precluding judicial review in involuntary physical disability retirement cases. The Federal Circuit stated that:

> [i]n *Lindahl*, it is correct that the subject claim had been made voluntarily, but the fact was not pivotal, as it could not be. The critical language of 5 U.S.C. § 8347(c) makes no distinction between voluntary and involuntary claims based on physical disability. Thus the principle in *Lindahl* remains applicable. This court does not have jurisdiction to review decisions of the MSPB on physical disability claims which are involuntary.

724 F.2d at 120.

Although using this distinction of voluntary vs involuntary retirement in *Lindahl* to reject an entire body of Court of Claims precedent, the Federal Circuit in *Henderson* completely emasculates that distinction and makes no reference to the *Scroggins* line of cases.

The other federal circuits relying on the *Scroggins* line of reasoning for employee initiated disability applications have made no such distinction or reference to dissimilar treatment based upon voluntary vs involuntary consid-

erations. *Parodi* v. *MSPB*, *supra* (9th Cir. 1982); *Pitzak* v. *OPM*, *supra* (10th Cir. 1983); *Turner* v. *OPM*, *supra* (D.C. Cir. 1983); *McCard* v. *MSPB*, *supra* (11th Cir. 1983).

The *Scroggins* line of cases which has also been uniformly applied by the Court of Claims since the inception of the finality language in the disability retirement statute can not be summarily ignored under this thin and untenable distinction.

III. The Legislative History Surrounding the 1980 Amendment to the Disability Retirement Statute Evinces a Congressional Intent to Maintain the Prevailing Judicial Review in Existence for Over Twenty Years

The Federal Circuit states that it finds no support for the view that the 1980 amendment to the disability retirement statute merely expanded the "breadth" of review in cases beyond the "limited" review said to be available for such cases in *Scroggins*. Again in making this finding the Federal Circuit limits *Scroggins* impact to that of involuntarily disability retirement cases for mental conditions, ignoring its expansion by the Court of Claims and other circuits to involuntarily retirement for physical disability and "voluntary" disability retirement claims. *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980); *Parodi*, *supra*; *Turner*, *supra*. The Federal Circuit plurality states that by leaving the finality language in 5 U.S.C. § 8347(c), Congress intended what it always provided in its original enactments of no judicial review. 718 F.2d at 399, 400.

It is submitted that the dissenting opinion of the four circuit judges, written by Circuit Judge Davis, is the more reasoned approach. 718 F.2d at 405, 406. According to this analysis, the 1980 amendment of 5 U.S.C. 8347 did not lessen or abolish the narrow judicial review that has been accorded to disability retirement matters at least since 1956. *Scroggins*, *supra*, *McGlasson*, *supra*, *Fancher*, *supra*, *et. al.* The legislative objective, the dissent states, in contrast to the majority, was to expand judicial review in

the special area of involuntary mental disability retirement. This view was shared wholeheartedly by five other circuits considering this matter, *Parodi* v. *MSPB* (9th Cir.) *supra; McCard* v. *United States* (11th Cir.) *supra; Turner* v. *OPM* (D.C. Cir) *supra; Pitzak* v. *OPM* (10th Cir.), *supra;* and *Lancelotti* v. *OPM*, 704 F.2d 91 (3rd Cir. 1983).

The dissent herein summarizes the core of these recent decisions:

> (a) [T]he standard of narrow judicial review [Scroggins formula] had been utilized for many years when Congress considered the 1980 amendment; (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of that Congressional consideration was the over-narrowness of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed the then Director of OPM expressly told Congress that the prior standard would continue for non-member disability cases, see *Turner* v. *OPM*, *supra*, 707 F.2d at 1503-1504); (e) there is nothing in the Committee reports that the prior judicial standard was no longer to be followed in the non-mental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).

718 F.2d at 406

The decisions in *McCard*, *Turner* and *Parodi* further highlight the legislative history and demonstrate the Federal Circuit plurality's fatal misreading and general disregard of that history. The purpose of the 1980 amendment was to prevent involuntary disability retirement proceedings from being misused to force unpopular employees out of active service for reasons of mental incompetency. H. R. Rep. No. 1080; 96th Cong. 2d Sess. 2-3 (1980). To check this possibility of misuse, Congress expanded the scope of judicial review beyond the *Scroggins* level, for this one class of disability determinations, to

include the traditional "substantial evidence" and broad scope of review under section 7703. S. Rep. No. 1004, 96th Cong. 2d Sess 2, *reprinted* in 1980 U.S. Code Cong. and Ad News 5986, 5987. "Given that the sole purpose of the amendment was to expand judicial protection of employees through review of factual findings in a certain subset of cases, it hardly follows that Congress negatively implied its intent to strip employees of *Scroggins*—type review in other cases." *Turner* v. *OPM*, *supra*, 707 F.2d at 1503. To the contrary, the House Report to the 1980 amendment in discussing the problem Congress intended the amendment to remedy, pointed to three cases that did not allow "judicial review," to show that the amendment was necessary. H. Rep. No. 1080, 96th Cong. 2d Sess 4 (1980). As the court in *Parodi*, *supra*, 690 F.2d at 736, points out, in all three of these cases, *Scroggins*, *McGlasson*, and *McFarland*, the Court of Claims held that under section 8347(c) courts should not review the factual findings that underlie an agency's disability and dependency determinations, but that limited judicial review, i.e. review under the *Scroggins* rule, is appropriate. Thus the *Parodi* court properly concludes, the bar on judicial review referred to by the report precludes only judicial review of factual findings. 690 F.2d at 736.

This view, moreover, was confirmed by the Director of OPM himself, who wrote to Congress at the time of the amendment's consideration, and whose statements were submitted in the record. The statement of the OPM Director provided:

> We believe that it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements. An employee who *voluntarily* applies for disability retirement seeks to establish title to a benefit granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. It is appropriate therefore, that OPM decisions on voluntary applications be

> conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.

H. R. Rep. No. 1080, *supra* at 7-9.

The latter standard being a recitation of the *Scroggins* language, it becomes unfathomable how the Federal Circuit concludes that "the legislative history contains no statement of the [Scroggins] formula," 718 F.2d at 399, and that Congress in essense was ignorant of its application. See also virtually identical letter of Director OPM to Senator Ribicoff (Sept. 25, 1980), preceded by a statement of the Committee that OPM endorses its position. S. Rep. No. 1004, 96th Cong. 2d Sess. (1980). Although OPM's position now apparently has changed, far more deference is due the agency's contemporaneous explanation of the statute's effect than is due its present post-hoc litigating position. *Turner* v. *OPM*, *supra*, 707 F.2d at 1504; *Udall* v. *Tallman*, 380 U.S. 1(1965). Indeed, MSPB, the final administrative arbiter of this matter, by its advice to petitioner at the bottom of its Opinion and Order in this case, and its position before the Federal Circuit, flatly contradicts OPM. *Turner*, *supra*, 707 F.2d at 1504. An administrative agency's construction of the statutes which it is charged with administering is due substantial deference. *Udall* v. *Tallman*, *supra*, 380 U.S. at 16; *United States* v. *Rutherford*, 442 U.S. 544, 553. The Federal Circuit without justification failed to accord appropriate deference to the position of the MSPB. *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 381(1969); *Power Reactor Development Company* v. *International Union of Elec., Radio, and Machine Workers*, 367 U.S. 396, 408(1961).

The legislative history in the House of Representatives in setting forth OPM's position also specifically states that it is in accord with the committee's stance that it is reasonable and proper to restrict "expanded" judicial

review to involuntary disability retirements. H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. P. 3(1980).

The dissent, written by Circuit Judge Davis, cogently states that in the face of this legislative history:

> it is hard for me to think that, in explicitly expanding review for mental cases, Congress silently withdrew for non-mental cases the limited judicial review that had been allowed. To paraphrase what the Supreme Court said in *Merrill, Lynch, Pierce, Fenner and Smith* v. *Curran*, 456 U.S. 353, 381-2 . . . (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another statute had incorporated a prior judicial gloss) "it is abundantly clear" that the "Scroggins standard was a part of the 'contemporary legal context' in which Congress legislated in 1980. "In that context the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the *Scroggins* standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, the language carried with it the existing judicial interpretation.

718 F.2d at 406.

Indeed, Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation of a statute when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 419(1975). Further, the recodification or revision of a Congressional act "indicates approval of court interpretations of the statute made prior to reenactment." *Atkins* v. *United States*, 556 F.2d 1028, 1039 (Ct. Cl. 1977); *cert. denied*, 434 U.S. 1009 (1978). These presumptions or indications notwithstanding, the Congress in its 1980 amendments specifically recognized that the judicial review for agency initiated mental disability cases was

merely expanding an existing *Scroggins* type of judicial review. Congress was clearly cognizant of the judicial interpretations of 5 U.S.C. § 8347(c) and it intended to continue the existing remedy of *Scroggins* type of review, based on its leaving the other portions of the statute intact.

IV. The Court of Appeals for the Federal Circuit has jurisdiction pursuant to 5 U.S.C. § 7703 and 28 U.S.C. § 1295 to review decisions of MSPB relating to disability retirement.

It is clear from the language and history of Chapter 77 of the Civil Service Reform Act that it was intended to govern all matters within the appellate jurisdiction of the MSPB. MSPB, whose interpretation of the statute it administers is entitled to great deference, *Udall* v. *Tallman, supra* took that identical position before the Federal Circuit. Similarly, Judge Smith, writing for four dissenting Federal Circuit judges took a similar position. 718 F.2d at 407, 408.

Section 7701(a) provides:

> An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from *any* action which is appealable to the Board under *any* law, rule or regulation. (Emphasis added)

Similarly, 5 U.S.C. § 7703(a) provides:

> *Any* employee or applicant for employment adversely affected or aggrieved by *a* final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision. (Emphasis added)

OPM's denial of Petitioner's application for disability retirement from his position as a federal employee was an action appealable to the MSPB pursuant to 5 U.S.C. § 8347(d)(2). Petitioner exercised his right to appeal OPM's decision to the MSPB and was adversely affected by the MSPB's decision in this case. Petitioner is thus entitled to review to the Federal Circuit (see 28 U.S.C.

§ 1295(a)(9)), under the unambiguous language of the statute.

The legislative history of these provisions provide that section 205 amending Chapter 77 "makes important changes in the procedures governing review by the Board [MSPB] and the courts of adverse actions, such as removals, and *other appealable actions* taken by an agency." (Emphasis added). S. Rep. No. 95-969, 95th Cong. 2d Sess, 51, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 2773. The legislative history states further that section 7703(a) "applies to judicial review of *all* final orders or decisions of the Board. . ." Id. at 62, *reprinted in* 1978 U.S. Code Cong. and Ad. News at 2784. The administration's Reorganization Plan No. 2 of 1978, 5 U.S.C. § 1101 Note, which accompanied the legislative proposal for civil service reform as part of the legislative package, specifically included retirement cases. By way of this Reorganization Plan, "any action to the Board" would include the appellate adjudicatory responsibilities of the Civil Service Commission in disputes relating to retirement benefits. S. Rep. No. 95-969, 95th Cong. 2d Sess 1-2(1978). The Civil Service Reform Act amended existing statutes conferring appeal rights under 5 U.S.C. § 8347(d) to substitute the MSPB for the Commission. Review of all non-discrimination cases from decisions of the MSPB were conferred by Section 7703 upon the Court of Appeals and the Court of Claims. (Subsequently transferred to the Federal Circuit by the Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(9)).

Furthermore, as the dissenting opinion written by Judge Smith recognized, Section 7701(a) is the main jurisdictional basis for appealable agency adverse actions—and the jurisdiction of section 7701(a) actions is plenary. *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1317 (Fed. Cir. 1983). Although Section 7701(a) is expressly made the jurisdictional basis for actions under *inter alia*, Sections 4303(e) and 7513(d), other agency actions, such as the withholding of periodic step increases,

under Section 5335(c) have been held to be appealable under section 7701. *Meyer* v. *Department of Health and Human Services*, 666 F.2d 540 (Ct. Cl. 1981). The courts have asserted jurisdiction in other cases, although not specifically provided under Section 7701 or other governing statutes. E.q. Reemployment priority rights—*Raicovich* v. *U.S. Postal Service*, 675 F.2d 417 (D.C. Cir 1982); *Stevens* v. *TVA*, 687 F.2d 158 (6th Cir. 1982); Reduction in force—*Mead* v. *MSPB*, 687 F.2d 285 (9th Cir. 1982); *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982); and disability retirement cases previously recited. The plurality's bare statement that retirement benefit claims are not adverse action claims, 718 F.2d 391 (1983), does not suffice to deny jurisdiction of all other claims under 5 U.S.C. § 7703. The dissent asserts that an analysis of Section 7703 reveals that the Federal Circuit has jurisdiction of all MSPB decisions except discrimination cases and possibly certain Special Counsel and Senior Executive Service Cases.

The dissent remarks that the most significant anomaly in the majority holding is the conflict between their holding of no review and the plenary authority of the Federal Circuit to review, as set out in Section 7703(a)(1). Under the Federal Courts Improvement Act, the entire jurisdiction created by Section 7703 (judicial review of *all* final orders or decisions of the Board) devolved upon the Federal Circuit. H. R. Rep. No. 312 at 18 (jurisdiction . . . over all appeals from the MSPB), S. Rep. No. 275, 97th Cong. 2d Sess. 21, reprinted in 1982 U.S. Code. Cong. and Ad. News 11, 31 ("jurisdiction of *any* appeal from a final order or final decision of the Merit Systems Protection Board). As the dissent urges "there is absolutely no reason to believe—and numerous reasons to doubt—that Congress intended this court to approach its MSPB jurisdiction with the extreme caution practiced by the majority."

This construction by the plurality totally contravenes the presumption in favor of judicial review, *Abbott Laboratories, supra*, and the statutory principle of reconciling statutes where possible. *Morton* v. *Mancuri*, 417 U.S. 535, 551(1974); *Pitzak* v. *OPM, supra*, 710 F.2d at 1479. The plurality's holding totally barring all review in these cases further frustrates the intent of the Civil Service Reform Act and the Federal Courts Improvement Act to have the Federal Circuit hear all appeals from the MSPB.

CONCLUSION

For the aforesaid reasons, the decision of the United States Court of Appeals for the Federal Circuit should be reversed.

Respectfully Submitted,

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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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No. 83-5954

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Interest of the Amicus Curiae

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 200,000 members. The American Civil Liberties Union Fund of the National Capital Area is the Washington, D.C. area litigation branch of the ACLU. For more than sixty years,

the ACLU has been dedicated to the protection of constitutional rights.

This case raises significant constitutional issues of separation of powers and the extent to which Congress can foreclose judicial review of questions of law affecting significant individual interests. The ACLU submits this brief to assist the court in the resolution of these issues.*/

SUMMARY OF ARGUMENT

Chapter 77 of the Civil Service Reform Act (CSRA) provides for judicial review of final agency actions.1/ Section

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*/ The parties have consented to the filing of this brief amicus curiae. The letters of consent have been lodged with the Clerk of this Court.

1/ 5 U.S.C. § 7703. This provision must be read in conjunction with the overall statutory framework of the Administrative Procedure Act (APA), by which Congress created the executive agencies, provided for their operation and sought to maintain the separation of powers and the integrity

(footnote continued)

8347 of the Civil Service Retirement Act, characterizes determinations by the Office of Personnel Management in the distribution of disability and retirement benefits as "final and conclusive . . . and not subject to review."[2/] The Court of Claims, which prior to creation of the Federal Circuit had jurisdiction over appeals of the denials of retirement and disability payments,[3/] read the two provisions to provide judicial review under a narrow

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1/ (continued)
of an independent judiciary. The APA allows judicial review for any individual "aggrieved by agency action." 5 U.S.C. § 702. The congressional policy embodied in the APA must be brought to bear in any discussion of executive agencies, since the APA provides the general framework for the operation of all agencies.

2/ 5 U.S.C. § 8347(c). The Civil Service Retirement Act constitutes the portion of the CSRA which governs retirement and disability benefits.

3/ Appeals are taken from final decisions of the Merit Systems Protection Board. 5 U.S.C. § 7703.

set of circumstances involving an error going to the "heart of the administrative determination," such as a "misconstruction of the governing legislation" or a "substantial departure from important procedural rights."[4/] The Court made this determination notwithstanding the preclusive language of Section 8347.

In 1980 Congress amended Section 8347, however, to address evidence of agency abuse such as increased incidences of agency-initiated retirement for "problem" employees.[5/] The amendment, sub-

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4/ Scroggins v. United States, 397 F.2d 295 (Ct. Cl. 1968), cert. denied, 393 U.S. 952 (1968). See also McGlasson v. United States, 397 F.2d 303 (Ct. Cl. 1968), decided the same day as Scroggins; Fancher v. United States, 588 F.2d 803 (Ct. Cl. 1978); Polos v. United States, 621 F.2d 385 (Ct. Cl. 1980). The standard has its origins in earlier cases. See Gaines v. United States, 158 Ct. Cl. 497 (1961), cert. denied, 371 U.S. 936 (1962); Smith v. Dulles, 236 F.2d 739 (D.C. Cir. 1956).

5/ S. Rep. No. 96-1004, 96th Cong., 2d Sess. reprinted in 1980 U.S. Code Cong. & Ad. News 5987.

section (d), expressly allows judicial review of involuntary retirement cases pursuant to Section 7703 of the CSRA. At the time of the amendment, jurisdiction to hear the appeals of the denial of the payments was vested in the several federal courts of appeals. Several circuits continued to grant review in voluntary retirement cases pursuant to the Scroggins standard.[6/] A split in the circuits developed, however, when some circuits denied review.[7/]

In 1982, the Court of Appeals for the Federal Circuit was created and given

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6/ See Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982); McCard v. Merit Systems Protection Board, 702 F.2d 978 (11th Cir. 1983); Turner v. Office of Personnel Management, 707 F.2d 1499 (D.C. Cir. 1983).

7/ See Campbell v. Office of Personnel Management, 694 F.2d 305 (3d Cir. 1982); Chase v. Office of Personnel Management, 695 F.2d 790 (4th Cir. 1982); Morgan v. Office of Personnel Management, 675 F.2d 196 (8th Cir. 1982).

exclusive jurisdiction over these appeals.[8/] That court held, in Lindahl v. Office of Personnel Management, 718 F.2d 391 (Fed. Cir. 1983), that because of the finality language of Section 8347, it had no jurisdiction to review the appeal of the denial of Mr. Lindahl's disability annuity. This Court should reverse that decision for a number of reasons.

First, Congress did not intend to preclude all judicial review of all voluntary retirement cases when it amended Section 8347. The statutory framework of the Administrative Procedure Act and the Civil Service Reform Act expressly defers to the doctrine of separation of powers.[9/] The judicial interpretation of the

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8/ 28 U.S.C.A. § 1295 (a)(9) (West. Supp. 1983).

9/ This is embodied in the standard for review set out in the APA (5 U.S.C. § 706) and the CSRA (5 U.S.C. § 7703).

conflict created by Section 8347, found in the Scroggins line of cases, also respects the fact that the federal system cannot function justly and efficiently without allowing review of errors of law committed by the executive.[10/] In fact, principles of statutory construction mandate the conclusion that Section 8347 must be read to provide for judicial review.[11/]

Second, Congress could not have written Section 8347 to preclude all judicial review, since it cannot divest the judiciary of its power to review errors of law and adjudicate significant individual rights.[12/] The doctrine of separation of

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10/ See, e.g., Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982).

11/ For example, this court has established a presumption in favor of reviewability. See Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

12/ See Stark v. Wickard, 321 U.S. 288 (1944); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

powers seeks to preserve independent functions for each of the branches. Congress cannot now vest the executive with the power to make unchecked determinations in areas typically reserved for the judiciary to review.[13/]

Finally, retirement benefits are significant rights, the denial of which must not be immune from review.[14/] Federal employees must have the option to seek judicial review to prevent unlawful denial of their rights to a disability or retirement annuity. The structure of the federal system and the separation of powers doctrine plays a critical role in providing this protection. Accordingly,

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13/ See Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S.Ct. 2858 (1982).

14/ See American Postal Workers Union, v. United States Postal Service, 707 F.2d 548, 554 (D.C. Cir. 1983).

Amicus respectfully urges that this Court reverse the decision of the Court of Appeals for the Federal Circuit.

ARGUMENT

The principle of separation of powers is at the heart of the American experiment in self-government. Drawing on the political theory of Locke[15/] and Montesquieu,[16/] the Founders carefully divided the functions of government into three categories: (1) the making of new rules of law; (2) the implementation of existing rules of law; and (3) the resolution of disputes over the applicability, meaning

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15/ J. Locke, The Second Treatise of Government, reprinted in Two Treatises of Government (P. Laslett 2d ed. 1967).

16/ C. Montesquieu, The Spirit of the Laws (T. Nugent Trans. 1949).

and effect of law.[17] The law-making function was vested by Article I in the legislative; the implementation function by Article II in the executive; and the law-declaring function by Article III in the judiciary.[18]

Two distinct policies are advanced by separation of powers. First, by dividing the functions of government among three separate clusters of officials, the Founders sought to prevent a concentration of power which might threaten individual liberty. The Federalist No. 47 (J. Madison). Scarcely less important, the

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17/ See generally, M. Vile, Constitutionalism and the Separation of Powers (1967); W. Gwynn, The Meaning of the Separation of Powers (1965).

18/ See generally, Sharp, The Classical Doctrine of American Separation of Powers, 2 U. Chi. L. Rev. 385 (1934-35); Neuborne, Judicial Review and Separation of Powers in France and the United States, 57 N.Y.U. L. Rev. 363 (1982).

Founders believed that by parcelling the functions of government to organs specially designed to perform them, the government's capacity to operate efficiently and justly would be enhanced.[19/]

This Court has consistently recognized that one of its most significant constitutional resporsibilities is to serve as defender of the principle of separation of powers. Thus, when the executive branch has sought to exercise the law-making function vested by Article I in the legislature, this Court has firmly rebuffed it. See, e.g., Youngstown Sheet & Tube Co. v Sawyer, 343 U.S. 579 (1952); see also,

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19/ Justice Irving R. Kaufman has detailed the origins and development of our independent judiciary. See Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671 (1980). He demonstrates that unless the court can act as a separate institution and retain its traditional function, it cannot operate efficiently within the federal system. Id. at 687-700.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Hynes v. Borough of Oradell, 425 U.S. 610 (1976); F.C.C. v. Midwest Video Corp., 440 U.S. 689 (1979).

Similarly, when Congress has sought to exercise the implementation function vested by Article II in the executive branch, this Court has firmly rebuffed it. See, e.g., Buckley v. Valeo, 424 U.S.1, 120-146 (1976); I.N.S. v. Chadha, 103 S. Ct. 2764 (1983); Springer v. Phillipine Islands, 277 U.S. 189 (1926); cf., Myers v. United States, 272 U.S. 52 (1926); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

Finally, when either branch has threatened the judicial function, this Court has staunchly defended the concept of an independent judiciary. E.g., Northern Pipeline Constr. Co. v. Marathon Pipe-

line Co., 102 S.Ct. 2858 (1982); United States v. Nixon, 418 U.S. 683, 702 (1974); I.N.S. v. Chadha, 103 S. Ct. 2764, 2789 (1983) (Powell, J. concurring); United States v. Lovett, 328 U.S. 303 (1946); see also, Crowell v. Benson, 285 U.S. 22 (1932); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); cf. United States. v. Klein, 80 U.S. (13 Wall.) 128 (1871).

In this case, the Court of Appeals for the Federal Circuit has construed Section 8347 of the Civil Service Retirement Act, 5 U.S.C. § 8347, to preclude all judicial review of decisions of the Merit Systems Protection Board denying disability payments to federal employees who have voluntarily retired from federal service. This necessarily includes precluding review of alleged errors of law in construing and administering the governing statutes.

Such a construction of Section 8347 is doubly violative of separation of powers principles. First, it vests total power over legal questions affecting the administration of a congressional program of vital importance to individuals in the executive branch. This violates the prophylactic principle of power-sharing which is at the core of out tripartite plan of government. Second, it vests the final power to declare the meaning of a congressional statute in an executive official who lacks the functional expertise and independence of a judicial officer.20/

The two issues raised by this case, therefore, are, first, whether Congress,

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20/ These two concerns address the need to maintain the integrity of an independent judiciary. Id. at 687-701. "The essence of judicial independence . . . is the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality." Id. at 688.

in enacting Section 8347, intended to violate basic separation of powers principles by vesting unreviewable power to declare the meaning of a Congressional statute in the executive branch; and, second, whether such an attempt to vest a classic judicial function solely in the executive branch would be constitutional.

As Northern Pipeline Construction Co. v. Marathon Pipeline Co., 102 S.Ct. 2858 (1982), makes clear, the constitution places limits on Congress' power to allocate the judicial function to non-judicial organs. In Northern Pipeline, Congress' attempt to vest an Article I bankruptcy judge with Article III responsibilities was deemed violative of separation of powers principles. In this case, the construction of Section 8347 espoused by the court below does not merely seek to use Article I judges to perform Article III functions, as in Northern Pipeline, it

seeks to eliminate the judicial function altogether by vesting the unreviewable power to declare the law on an executive official. Thus, unlike Palmore v. United States, 411 U.S. 389 (1973), where the judicial function was vested in an Article I judge possessing both the separate status and functional advantage of the judicial branch, the court below has construed Section 8347 as vesting the final law-declaring function in an executive official possessing neither separate status nor judicial expertise.21/

Given the central role played by the separation of powers in our governmental

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21/ Thus, this case does not raise the question of the degree to which Congress may vest the law-declaring function in an Article I as opposed to an Article III Court; but rather whether Congress may eliminate the judicial role in the law-declaring function altogether. See Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

structure, Congressional attempts to exclude the judiciary from any role in reviewing errors of law committed by executive officials during the administration of a Congressional program are extremely rare.[22/] Although the issue has never been decided, this Court has repeatedly recognized that any attempt to oust an Article III judiciary from the power to review constitutional questions involving the administration of a congressional program would raise profound constitutional questions. E.g., Crowell v. Benson, 285 U.S. 22 (1932), St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Johnson v. Robison, 415 U.S. 361 (1974).

22/ In United States v. Erika, 456 U.S. 201 (1982), this Court ruled that Congress had not authorized judicial review

(footnote continued)

Similarly, an attempt to prevent the judiciary - whether Article I or Article III - from reviewing non-constitutional errors of law committed by executive officials during the administration of a Congressional program would be unconstitutional.[23/]

22/ (continued)
of predominantly factual determinations by private insurance carriers of the amounts of certain categories of Medicare reimbursements. Unlike the present case, questions of law involving eligibility for Medicare reimbursement were fully reviewable in Erika. The Court explicitly declined to consider whether even the limited denial of judicial review at issue in Erika violated the Constitution. Id. at 206 n.5.

In Johnson v. Robison, 415 U.S. 361 (1974), the Court narrowly construed a limitation on judicial review of denials of Veteran's Benefits to avoid constitutional questions and permitted challenges to the constitutionality of the program. No question was raised as to the reviewability of non-constitutional issues of law. See also, Oesterich v. Selective Service System, 393 U.S. 233, 240 (1968) (Harlan, J., concurring).

23/ No question exists as to the power of an Article III court to pass on the con-

(footnote continued)

However, before considering whether Congress may oust the courts from the power to review errors of law committed by executive officials, the question of whether Congress has actually attempted to do so must be considered.

23/ (continued)
stitutionality of Section 8347. As Professor Hart has noted, Article III courts may utilize available bases of general jurisdiction to evaluate the constitutionality of selective attempts to restrict judicial review. Hart, The Power of Congress to Limit the Jurisdiction of the General Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1374-83, 1386-1402 (1953); Note, Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers, 97 Harv. L. Rev. 778, 783, n.36 (1984). Following this Court's reasoning in Johnson v. Robison, 415 U.S. 361 (1974), section 8347 cannot be read to eliminate judicial power to review constitutional questions, including the question of the constitutionality of eliminating review of all non-constitutional questions of law.

I. CONGRESS HAS NOT ATTEMPTED TO PRECLUDE JUDICIAL REVIEW OF ERRORS OF LAW COMMITTED BY THE MERIT SYSTEMS PROTECTION BOARD.

A. The Relevant Statutory Framework Embodies The Doctrine of Separation Of Powers.

In 1946, Congress enacted the Administrative Procedure Act (APA) in order to establish a cogent structure in which agencies could operate effectively and efficiently. See 5 U.S.C. §§ 551-706. Chapter seven of that Act provides for judicial review of final agency actions and explicitly controls all agencies unless otherwise specified by statute.[24/] The APA thus represents the framework through which Congress specified procedures for all executive agencies.

In 1978, Congress enacted the Civil Service Reform Act (CSRA) to preserve the merit system in the Federal workforce and

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24/ 5 U.S.C. § 701(a)(1).

protect federal employees and their statutorily created rights from infringement by their employer agency. See 5 U.S.C. §§ 1101-8913. Section 7703 of this Act provides for judicial review of final decisions of the MSPB. The Civil Service Retirement Act constitutes the portion of the CSRA which governs the distribution of retirement and disability annuities to federal employees. See 5 U.S.C. §§ 8331-8348. Section 8347, the provision at issue, characterizes determinations by the Office of Personnel Management as "final and conclusive."[25/] Notwithstanding that language, the Court of Claims read Sections 7703 and 8347 as carving out a narrow set of circumstances under which it would be proper to reverse the agency's

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25/ 5 U.S.C. § 8347(c).

determination.[26/] This decision became known as the Scroggins standard of review. In 1980, Congress sought to liberalize for a specific class of cases the narrow judicial review granted by Scroggins and thus added subsection (d) to Section 8347.[27/] It would be an ironic misinterpretation of Congressional intent to now read that

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26/ See Scroggins v. United States, 397 F.2d 303 (Ct. Cl. 1968), cert. denied, 393 U.S. 952 (1968).

27/ Congress granted judicial review pursuant to 5 U.S.C. § 7703 in cases where an individual was involuntarily retired by his or her agency based on mental condition. The amendment was prompted by evidence of agency abuse. "Allegations of increased use of such procedures to force unproductive or otherwise problem employees out of active service are considered to be serious by the committee and increased protection of employee rights is needed." S. Rep. No. 96-1004, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 5987.

amendment as cutting off all other judicial review.[28/]

The Administrative Procedure Act recognizes that the executive may not wholly displace the law-declaring function of the judiciary and thus provides judicial review for those individuals who are "aggrieved by agency action." 5 U.S.C. § 702. The legislative history behind this provision evidences a bias in favor of granting review:

> Very rarely do statutes preclude judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope

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28/ In fact, prior to creation of the Federal Circuit, several circuits did not so view Section 8347, but continued to grant review pursuant to Scroggins: see, e.g., Parodi v. Merit Systems Protection Board, 690 F.2d 731 (9th Cir. 1982); McCard v. Merit Systems Protection Board, 702 F.2d 978 (11th Cir. 1983); Turner v. Office of Personnel Management, 707 F.2d 1499 (D.C. Cir. 1983).

> of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. Rep. No. 752, 79th Cong., 2d Sess. (1946) reprinted in Legislative History of the Administrative Procedure Act at 212 (1946).

Scholars have validated the Congressional scheme and noted that it is axiomatic that an agency's exercise of its power cannot go unchecked. Professor Jaffe characterizes the requirement of judicial review as "the necessary premise of legal validity." L. Jaffe, Judicial Control of Administrative Action 321 (1965). Availability of review is one of the "psychological assumptions which support our system in which we turn to the judiciary for

protection against executive abuse." Id. at 324.29/

Congress thus devised a structure which would permit federal agencies to function effectively and efficiently and yet not exclude the judiciary. The scheme recognized the role of an independent judiciary, which

> traditionally exercised a reviewing function to ensure executive compliance with the applicable public law, policing executive officer's obedience to legisla-

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29/ Raoul Berger has gone further and stated that this "protection" rises to the level of a constitutional right. Berger, Administrative Arbitrariness and Judicial Review, 65 Colum. L. Rev. 56, (1965). He draws this conclusion from three sources: "(1) the implications of the delegation of powers; (2) due process; and (3) the creation of the court for the purpose, among others, of protecting the people from governmental excesses." Id. at 88-89. Final review by a court thus provides a shield against a variety of arbitrary actions taken by agencies, such as an "action which is unsupported by evidence or one which "turns on [the] failure to consider relevant evidence." Id. at 83.

> tive commands and providing a further set of internal checks on governmental power used against the citizenry.

S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 438 (1979). The congressionally established standard of review embodied in the Administrative Procedure Act permits agencies and the courts to coordinate their tasks to afford efficient government and effective protection for individual rights.

That standard, 5 U.S.C. § 706 of the Administrative Procedure Act, is also reflected in 5 U.S.C. § 7703 of the Civil Service Reform Act. Both standards are intended to be deferential in order to preserve the integrity of an agency's fact-finding. Thus, trial de novo is not permitted; only a second look at the administrative record is authorized. See

Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973).[30]

This Court has construed the standard of review to include a two-part test. First, a reviewing court must determine the scope of the agency's authority and whether the decisionmaker acted within his purview.[31] Second, the court must investigate the facts supporting the agency's decision and "consider whether the decision was based on a consideration of the relevant factors and whether there has

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30/ In fact, the legislative history of the Administrative Procedure Act explicitly states that Congress wished the court to be confined in its review to the agency record. S. Rep. No. 752, 79th Cong., 2d Sess. (1946) reprinted in Legislative History of the Administrative Procedure Act at 83 (1946).

31/ Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

been a clear error of judgment."[32/]

The legislative history of the Civil Service Reform Act reinforces this standard of judicial review. The Merit Systems Protection Board is empowered to make the relevant factual findings. Its findings are conclusive if supported by substantial evidence in the administrative record. Agency actions may be reversed by the judiciary, however, if the procedures followed were in error and "substantially impaired the right of the employees." S. Rep. No. 95-969, 95th Cong., 2d. Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 2784.

The statutory standard is gracefully consistent with the goal of the separation of powers. To permit trial de novo would subvert the purpose of creating agencies

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32/ Id.

with expertise to make factual determinations. But to preclude all review would be tantamount to withdrawing the basic power of the courts to decide conclusively questions of law and individual rights. Thus, reversals of agency decisions are only proper if an employee's legal rights have been impaired. Indeed, this Court has recognized that it is empowered to protect rights granted by Congress when they have been vitiated by arbitrary agency action. See Leedom v. Kyne, 358 U.S. 184, 192 (1958).

B. The Scroggins Standard Respects The Requirement Of Judicial Review.

The Scroggins standard of review under Section 8347, allowed judicial review only in cases

> when there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error

> going to the heart of the administrative determination.33/

The finality language of that section was seen as "a special and unusual restriction on judicial examination, and under it, courts are not free to review . . . retirement decisions as they would be if the 'finality' clause were not there."34/ This standard remains true to the scheme envisioned by the Constitution; agencies are free to exercise their expertise in making factual determinations, yet courts are free to review those decisions to ensure that the agency acted

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33/ Scroggins v. United States, 397 F.2d 295, 297 (Ct. Cl. 1968), cert. denied, 393 U.S. 952 (1968). The standard has its origins in earlier cases. See Gaines v. United States, 158 Ct. Cl. 497, 502 (1961), cert. denied, 371 U.S. 936 (1962); Smith v. Dulles, 236 F.2d 739, 742 (D.C. Cir. 1956).

34/ 397 F.2d at 297.

within its authority and did not infringe on individual rights.

When Congress amended Section 8347 in 1980 to expressly allow expanded review in a narrow class of cases involving involuntary retirement, courts were faced with the difficulty of reconciling the change with the narrow review which had previously been accorded claimants under the Scroggins standard.[35/] Many courts

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35/ The amendment added subsection (d) to 5 U.S.C. § 8347. That section reads, in pertinent part:

> In the case of any individual found by the Board to be disabled in whole or in part on the basis of the individual's application by an agency for purposes of disability retirement under section 9337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

continued to permit review, and posited an interpretation for the amendment which is consistent with both separation of powers principles and the Administrative Procedure Act.[36/]

For example, the court in McCard v. Merit Systems Protection Board, 702 F.2d 978, 982 (11th Cir. 1983), pointed out that since the legislative reports accompanying the amendment were scant,[37/] there was no "clear and convincing" evidence as required by the Administrative Procedure Act that Congress intended to bar judicial

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36/ See, Parodi v. Merit Systems Protection Board, 690 F. 2d 731 (9th Cir. 1982); McCard v. Merit Systems Protection Board, 702 F.2d 978 (11th Cir. 1983); Turner v. Office of Personnel Management, 707 F. 2d 1499 (D.C. Cir. 1983).

37/ The amendment was prompted by evidence of agency abuse, i.e., excessive "agency-initiated involuntary disability retirements for reasons of mental competency." S. Rep. No. 96-1004, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 5987.

review.[38/] Rather than permit review in only one class of case, the court in McCard concluded that the better approach would be to reaffirm the narrow review which had previously been authorized under the Scroggins standard and permit full de novo review under Section 7703 for involuntary retirement disputes. This interpretation respects the role of the judiciary and reconciles 5 U.S.C. § 7703 with 5 U.S.C. § 8347.

C. The Court Should Not Read The Amendment To Section 8347 As A Bar To Judicial Review.

A close review of the hearings concerning the 1980 amendment to Section 8347

38/ 5 U.S.C. § 701(a)(1) authorizes judicial review to be "precluded by statute." The legislative history of the Administrative Procedure Act explicitly states that such preclusion is only valid if there is "clear and convincing evidence" that it was Congress' intention to disallow judicial review. S. Rep. No. 752, 79th Cong., 2d Sess. (1946) reprinted in Legislative History of the Administrative Procedure Act at 275 (1946).

reveals that Congress intended to preclude review only of the factual findings of the Merit System Protection Board. The testimony acknowledges that this would not wholly bar judicial review since

> the courts already may review questions of procedure as distinguished from questions of fact concerning the disability itself, and employees are, therefore, not entirely precluded from obtaining judicial review.39/

The hearings also discussed the "present ban" on judicial review of involuntary retirements based on an employees' mental condition40/, referring to the Scroggins standard. The amendment thus merely removes the ban to full de

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39/ Hearing Before the Subcomm. on Compensation & Employee Benefits of the Comm. on Post Office & Civil Serv., 95th Cong., 2d Sess. (1978) (Statement of Gary Nelson).

40/ S. Rep. No. 96-1004. 96th Cong., 2d Sess. reprinted in 1980 U.S. Code Cong. & Ad. News 5986.

novo review with respect to involuntary retirement cases,[41/] but retains the traditional Scroggins standard in voluntary cases. This interpretation preserves the necessary distribution of functions among departments; the executive finds facts within its area of expertise and the judiciary interprets law to determine whether the executive exceeded its authority.[42/]

41/ Hearing Before the Subcomm. on Compensation & Employee Bnefits of the Comm. on Post Office & Civil Serv., 95th Cong., 2d Sess. (1978) (Report of Mrs. Spellman).

42/ In fact, the director of the Office of Personnel Management, Alan K. Campbell, concurred in this view. He stated that the amendment granted "expanded judicial review" or "full review" under 5 U.S.C. § 7703 for involuntary retirement determinations. Voluntary applications, however, would remain factually conclusive and reviewable only under the Scroggins standard. Id. (Statement of Alan K. Campbell, Director of Office of Personnel Management).

This court's well-established presumption in favor of reviewability must also bear on the interpretation of section 8347. The requirement is stated in varying ways but the message is clear: the evidence must be "clear and convincing" that Congress intended to restrict judicial review.[43/] The agency thus bears a "heavy burden of overcoming the presumption that Congress did not mean to prohibit all judicial review.[44/]

Without an unambiguous directive from Congress that it intended to preclude review, it is incumbent on the judiciary to interpret a statute to afford maximum protection to the individual rights at stake:

43/ See Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); Barlow v. Collins, 397 U.S. 159, 167 (1976).

44/ Dunlop v. Bachowski, 421 U.S. 560, 567 (1975).

> [T]he right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized.

Barlow v. Collins, 397 U.S. 159, 167 (1970).

In this instance, Congress has clearly intended to provide government employees with the full benefit of a fairly administered civil service system.45/ Congress did not intend to withdraw protection for federal employees by excluding the judiciary from reviewing errors of law in benefits determination cases.

45/ See 5 U.S.C. § 1101(s) which enumerates the policy of the Civil Service Reform Act. The Civil Service System was intended to protect applications and employees "against any infringement of due process, self-incrimination, or other constitutional rights," S. Rep. No. 95-969, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 2740.

If the "entire legislative scheme"[46] is analyzed, it becomes clear that Congress did not intend to foreclose judicial review. This Court has held that

> the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to the others. The right to review is too important to be excused on such slender and indeterminate evidence of legislative intent.[47]

Merely because Congress explicitly opened an unrestricted avenue to full judicial review for involuntary retirement cases based on mental condition, does not support a conclusion that by negative implication, review is foreclosed in all other cases. Rather, an interpretation

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46/ Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

47/ Id. (citing L. Jaffe, Judicial Control of Administrative Action, 357 (1965)).

that the amendment to section 8347 envisioned a Scroggins standard of review in voluntary retirement cases comports with the scheme constructed by Congress in the Administrative Procedure Act and with the separation of powers doctrine.[48/]

Furthermore, when Congress amended section 8347, it was presumed to have been aware of the judicial interpretation surrounding the statute. This Court in Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982), held that since a private cause of action had been continually implied in the Commodity Exchange Act by the courts, it was part of the "contemporary legal context" when Congress revisited and amended the

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48/ A recent Eleventh Circuit decision, dealing with the award of attorneys' fees in disability benefits appeals, reiterated this interpretation. See Scarborough v. Office of Personnel Management, 723 F.2d 801, n.11 (11th Cir. 1984).

statute. When Congress left the major stautory provisions intact, an intention to preserve that remedy was thereby evidenced. See Lorillard v. Pons, 434 U.S. 575, 580 (1978). In fact, when a court has made a reasonable interpretation of a statute which has been accepted by other courts and not rejected by Congress, courts in the same position must give such an interpretation persuasive if not conclusive weight. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 (1973).

The Scroggins standard for review is a reasonable interpretation which has been adopted in order to avoid the dangers that foreclosing all judicial review would present. Congress was certainly aware of the Scroggins construction and had the opportunity to withdraw this avenue of judicial review explicitly when it amended Section

8347. See Lorillard v. Pons, 434 U.S. 575 (1978). It did not. This Court should not now on the basis of a facial reading of the statute, assume that Congress intended to abrogate the right of judicial review as enunicated in Scroggins.

Unlike the "sharply drawn" ban on judicial review at issue in United States v. Erika, 456 U.S. 201 (1982), an interpretation of the statute in this case compels a different result. First, the statutory language itself has been interpreted in conflicting ways. Second, there is no "clear and convincing" evidence that Congress intended to foreclose review when it amended section 8347.[49/] In view of this

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49/ The Administrative Procedure Act requires there to be such evidence. See Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); Ortego v. Weinberger, 516 F.2d 1005, 1009 (5th Cir. 1975).

Court's presumption in favor judicial review, the Court of Appeals should have been reluctant to rule that section 8347 bars access to review.

Moreover, when Congress wishes to seek to bar all judicial review, even of questions of law, it knows how to express itself. For example, when Congress wished to limit review of denials of veterans' benefits, the review provision of the Veteran's Compensation Act, 38 U.S.C. § 211 (a), expressly made decisions by the veteran's administrator "final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision." This language has consistently been held to bear no exceptions when the award or denial itself has been challenged. See, e.g., Martin v. United States, 197 Ct. Cl.

1062 (1972); Jump v. United States, 164 Ct. Cl. 453 (1964).[50/] Congress is thus well aware of how to draft legislation which would unambiguously foreclose review of the award determination itself.[51/] It has not done so in the case of retirement benefits. In the absence of such explicit Congressional language, this Court should not construe Section 8347 to preclude judicial review of erroneous executive determinations of significant questions of law.

50/ The constitutionality of denying judicial review of legal issues raised by a denial of Veteran's Benefits has not yet been tested.

51/ The review provision of the Federal Worker's Compensation Act, 5 U.S.C. § 8128, uses the same language to foreclose review. Again, this language has been held to make award determinations under the Act unreviewable. See DiPippa v. United States, 687 F.2d 14 (3d Cir. 1982); Calderon v. Tobin, 187 F.2d 514 (D.C. Cir. 1951), cert. denied, 341 U.S. 935 (1951); Blanc v. United States, 244 F.2d 708 (2d Cir. 1957), cert. denied, 355 U.S. 874 (1957).

II. CONGRESS MAY NOT OUST THE JUDICIARY'S JURISDICTION TO REVIEW ERRORS OF LAW COMMITTED BY EXECUTIVE OFFICIALS EMPOWERED TO ADMINISTER A CONGRESSIONAL PROGRAM.

A. The Doctrine Of Separation Of Powers Mandates That The Legislative And Executive Branches Not Be Able Unilaterally To Determine Issues Of Law And Fundamental Rights Without The Participation Of The Judiciary.

The Founders viewed undue concentration of governmental power as the principal threat to individual liberty.[52/] Their fear of the concentration of power found expression in a system of separate but equal branches: departments which could act together yet each be responsible for a different task within the republican

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52/ As Madison noted, "the accumulation of all powers, legislative, executive and judiciary, in the same hands, whether or one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, at 301 (J. Madison) (C. Rossiter ed. 1961).

scheme.[53/] They envisioned that the judiciary, by acting as the law-declarer, would protect individual rights and ensure that the legislature did not exceed its authority and encroach on those rights. Hamilton described the judicial function over 200 years ago:

> [T]he courts were designed to be an intermediary body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts.

The Federalist No. 78 at 467 (A. Hamilton) (C. Rossiter ed. 1961).

When Congress created executive agencies, it was obliged to ensure that they did not disturb the limitations histori-

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53/ Our forebears knew that "the preservation of liberty requires that the three great departments of power should be separate and distinct." Id.

cally placed on the executive. Professor Monaghan, a legal historian, has pointed out that

> [h]ad the doctrine of separation of powers been understood from the beginning to bar any judicial control of administrative power, the constitutional scheme would have gone seriously awry at the outset . . . A conception of public administration free from judicial oversight would have damaged the fundamental axiom of limited government.

Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1 (Jan. 1983).

This Court has similarly recognized that it is the judicial forum[54/] in which questions of law affecting individual rights are to be finally adjudicated. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803). It could not be otherwise since it is the judiciary which must

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54/ There is, in this case, no reason to consider whether Congress may look to Article I courts to perform aspects of the judicial function.

determine the limits of statutory grants of authority. See Stark v. Wickard, 321 U.S. 288, 310 (1944). Both the legislature and the executive are thus prevented from unilaterally imposing a "substantial deprivation" on an individual. I.N.S. v. Chadha, 103 S. Ct. 2764, 2789 (1983) (Powell, J., concurring); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 70 U.S. (4 Wall.) 277 (1866).

It is axiomatic, therefore, that when legal issues affecting significant interests are at stake, the judicial function cannot be wholly divested by legislation. The courts cannot be ousted of their responsibility to make independent determinations of constitutional challenges. See Crowell v. Benson, 285 U.S. 22, 64 (1932); See also, Johnson v. Robison, 415 U.S. 361 (1974) (construing limitation to permit

review of constitutional questions). Furthermore, the courts must be able to exercise their expertise in the interpretation of statutes. See Barlow v. Collins, 397 U.S. 159, 166 (1970). And finally, it is left to the judiciary to enforce an agency's compliance with its own regulations. See Service v. Dulles, 354 U.S. 363, 382-89 (1957). An effort by Congress to make certain administrative determinations of fact final and binding may pass muster, but a total preclusion of the judiciary's power to review cannot.

B. Retirement And Disability Benefits Constitute A Significant Interest Which Cannot Be Denied By Unilateral Executive Resolution Of Questions Of Law.

Retirement benefits are a form of deferred compensation. Virtually 7% of every dollar earned by a federal employee is withheld pursuant to 5 U.S.C. § 8334 to fund retirement or disability payments.

The right to receive the annuity vests upon retirement or the occurrence of the disability which makes retirement necessary.55/ While the right to receive a disability benefit may not be a vested property right, it is a significant fringe benefit of employment which may not be unlawfully withheld without access to judicial review. In fact, retirement benefits are listed along with salary increases, overtime, insurance benefits and travel allowances as "incidents of employee compensation" governed by title 5 of the

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55/ See American Postal Workers Union v. United States Postal Service, 707 F.2d 548, 554 (D.C. Cir 1983). The court there held that a protected right to retirement benefits only vests when the federal employee actually retires. Two Kansas decisions, however, have held that the public employee has a vested, or nonforfeitable contractual interest in her pension plan prior to retirement. Slowinski, Pensions: Public Employee Pension Plans as Contractual Obligations Granted Constitutional Protection, 20 Washburn L.J. 169 (1980-81).

United States Code. Kizas v. Webster, 707 F.2d 524, 536 (D.C. Cir. 1983). "These provisions are the exclusive source of employees' compensation rights" and as such, employees have an indefeasible right to these incidents. Id.

Since the retirement annuity may be properly characterized as either deferred compensation or a contractual obligation, it is unconstitutional to foreclose judicial review of errors of law leading to its denial. That is, since the benefits rise to a cognizable interest, their protection must be judicially guaranteed against erroneous legal determinations by executive officials. Congress cannot make a contract or grant valuable employment rights and then legislate that the determination of legal issues affecting that benefit or right shall be within the exclusive domain of the executive. Such a

scheme would deny those significant rights the protection they are due and seriously undermine the judicial power of the United States.[56/]

If Congress may not vest Article III power in an Article I judge,[57/] and if Congress may not itself exercise the judicial function,[58/] or interfere with its

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56/ Whether the employee is disabled or not when retirement vests, the right to receive the benefit is still earned; the same amount has been deducted from every dollar earned. One may argue that the amount of the disability annuity which exceeds the amount paid into the employee's pension fund constitutes a gratuity. This proves too much, however, for the agency would then be forced to account for the amount of retirement benefits paid, dollar for dollar. It is more reasonable to consider the payments into the fund as insurance premiums guaranteeing the employee an income upon retirement, whether voluntary or required by disability.

57/ Northern Pipeline Construction Co. v. Marathon Pipeline Co., 102 S.Ct. 2838 (1983).

58/ I.N.S. v. Chadha, 103 S. Ct. 2764, 2789, (1983) (Powell, J., concurring); Cummings v. Missouri, 70 U.S. (4 Wall.) 277 (1866).

performance,[59/] surely Congress may not eliminate the judicial function altogether by vesting executive officials with unreviewable power to commit errors of law in the administration of a Congressional program.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the decision of the Court of Appeals for the Federal Circuit be reversed.

Respectfully submitted,

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59/ United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL, *Petitioner*,

v.

OFFICE OF PERSONNEL MANAGEMENT

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS *AMICUS CURIAE*

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August, 1984

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QUESTION PRESENTED

Whether 5 U.S.C. § 8347(c) precludes judicial review of all decisions of the Office of Personnel Management with respect to its determination of questions of disability and dependency, including its determination of regulatory, statutory and constitutional questions.*

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*NARFE presented a second question raised by the decision below in its amicus brief in support of the petition for a writ of certiorari: whether the Federal Courts Improvement Act vests exclusive jurisdiction in the United States Court of Appeals for the Federal Circuit to review Civil Service retirement matters under 5 U.S.C. § 7703. The Federal Circuit has recently answered this question in the affirmative, *see Bonagura v. Office of Personnel Management*, No. 83-1349 (Fed. Cir. July 26, 1984), and thus its resolution in this Court is not called for at this time.

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Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 Harv.L.Rev. 778 (1984) 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-5954

WAYNE LINDAHL, *Petitioner*,

v.

OFFICE OF PERSONNEL MANAGEMENT

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES AS *AMICUS CURIAE*

The National Association of Retired Federal Employees ("NARFE") submits this brief *amicus curiae* to urge that the Court reverse the decision below and resolve the important questions raised by that decision relating to the Civil Service Retirement Act and the Civil Service Reform Act of 1978.

I. INTEREST OF NARFE

NARFE is a nonprofit, incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership now approaching half a million federal annuitants (retirees and survivors) living throughout the 50 states, Puerto Rico, the Canal Zone, the Republic of the Philippines, and various foreign countries. The national membership is organized in more than 1600 local chapters and 50 state federations. NARFE has been a major advocate in maintaining the in-

tegrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades. Moreover, when significant legal issues concerning the retirement system have been raised by administrative or judicial action, NARFE has participated in, or itself initiated, litigation for the common good of its members.

This case, because it raises fundamental questions about the character and legal status of the annuity rights earned through federal employment and the role of the courts in enforcing those rights, directly implicates paramount interests of NARFE. It is for this reason that NARFE sought and obtained the permission of the parties to participate before this Court as *amicus curiae*.

II. SUMMARY OF ARGUMENT

The issue presented to this Court is whether 5 U.S.C. § 8347(c) (1982), which states that decisions of the Office of Personnel Management ("OPM") with respect to its determination of questions of disability are "final and conclusive and are not subject to review," wholly bars judicial review of all aspects of OPM decisions concerning disability retirement matters, or, as the lower courts have uniformly held, merely prohibits judicial inquiry into the medical facts of particular disability determinations. The court below, contrary to over twenty years of precedent of its predecessor court and other courts,[1] held that § 8347(c) operated to foreclose judicial review. *Lindahl* v. *Office of Personnel Management*, 718 F.2d 391 (Fed Cir. 1983). This holding is erroneous.

Foremost, the court below erred in both misapplying and ignoring well-established canons of statutory construction to interpret § 8347(c) to preclude judicial review. First, the

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[1] *See, e.g., Gaines* v. *United States*, 158 Ct. Cl. 497, *cert. denied*, 371 U.S. 936 (1962); *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *Matricciana* v. *Hampton*, 416 F.Supp. 288 (D. Md. 1976); *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980).

legislative history of § 8347(c), from its enactment in 1946 and particularly its amendment in 1980, reveals that Congress intended only to constrict the standard of judicial review, precluding reviewing courts from inquiring into the *factual* determinations of medical disability. More important here than what the legislative history reveals, however, is what it does not reveal, and what it does not reveal is clear and convincing evidence of a Congressional purpose to foreclose judicial review. Second, the court below failed to give proper deference to the long-standing administrative constructions of § 8347(c) by the agencies charged with its implementation, OPM and the Merit Systems Protection Board ("MSPB"). These agencies, consonant with the settled judicial construction of § 8347(c), determined that only the medical determinations of disability were precluded from review. Finally, the court below failed to heed the admonition of this Court to resolve statutory questions whenever possible without raising constitutional conflicts. The construction of § 8347(c) adopted by the court below raises a question of substantial constitutional proportion: whether Congress properly can preclude judicial review of administrative determinations affecting property rights protected by the Fifth Amendment. Since it can hardly be said that the construction adopted by the court below was unambiguously mandated, it is evident that the court below erred in adopting a construction forcing the resolution of this constitutional issue.

III. ARGUMENT

A. There Is No "Clear And Convincing" Evidence Of Congressional Intent To Bar Access To Judicial Review

This court has repeatedly held that a statute will not be construed to bar access to judicial review unless Congress clearly and convincingly manifests such an intent. *Johnson* v. *Robison*, 415 U.S. 361, 373-74 (1974); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). The starting point for construing a statute must be the language of the statute itself. *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 541 (1978). However, because there is a strong presumption favoring judicial

review of federal administrative action, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the interpretation of a statute affecting the availability of judicial review can never end without inquiry beyond the words of the statute. *See, e.g., United States* v. *Erika, Inc.*, 456 U.S. 201, (1982); *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981). Inquiry beyond the literal words of the statute is especially appropriate where, as here, the statutory language lends itself equally well to two different constructions.[2] Yet even if the "plain language" of the statute were susceptible only to the construction adopted by the court below, the existence of compelling evidence of contrary congressional intent and the skepticism with which attempts to preclude review must be viewed constitute "rare and exceptional circumstances" mandating inquiry beyond the words of the statute. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 187 n.33 (1978).

Because the plurality of the court below was unable to "conceive of a more clear-cut statement of congressional intent" than that provided in the statute itself and thus ended its analysis with the language of the statute,[3] it ignored other significant and substantial indicia of congressional intent. Examination of the indicia which the court below ignored reveals not only that there is no clear and convincing evidence that Congress intended to preclude judicial review of disability retirement matters, but further that Congress intended to provide limited judicial review to all disability retirement applicants.

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[2] While the court below read § 8347(c) to preclude judicial review, the language on its face can as plausibly be read as precluding review only of factual questions of disability and dependency. The statute provides that OPM "shall determine questions of disability and dependency," its "decisions concerning these matters" being "final and conclusive" and "not subject to review." According finality to OPM's determination of "questions of disability" is not the same, however, as according finality to its determination of law and procedure. This reading is even more compelling when the controlling precodification language is examined. *See infra* at 5-6.

[3] "No legislative history existed in relation to [the finality clause], and none is needed in view of its continued unambiguous nature." 718 F.2d at 393.

1. Background

The Civil Service Retirement Act, Pub.L. No. 66-215, 41 Stat. 614 (1920) ("Retirement Act") was adopted to provide retirement security for career civil servants. From its inception, the Retirement Act provided disability annuities for career employees who became disabled, for medical reasons, from providing continued service. *See* Retirement Act § 5, 41 Stat. 616 (1920). In 1948, the Retirement Act was amended to incorporate a finality provision limiting judicial review of survivorship and disability benefits determinations. *See* Pub.L. No. 80-426 § 12(d)(3), 62 Stat. 56 (1948). As originally enacted, the finality provision read:

> Questions of dependency and disability arising under this section shall be determined by the Civil Service Commission and its decisions *with respect to such matters* shall be final and conclusive and shall not be subject to review. The Commission may order or direct at any time such medical or other examinations as it shall deem necessary *to determine the facts* relative to the nature and degree of disability . . .

Id., emphasis added. With the codification of Title 5 in 1966, however, this language was changed into its present form:

> The Commission shall determine questions of disability and dependency arising under this subchapter. The decisions of the Commission *concerning these matters* are final and conclusive and are not subject to review. The Commission may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability . . .

Pub.L. No. 89-554 § 8347(c), 80 Stat. 378 (1966), emphasis added.[4] Finally, the codified version was itself substantially amended in 1980. *See* Pub.L. No. 96-500, 94 Stat. 2696 (1980).[5]

While there is scant legislative history surrounding the enactment of the finality clause, much is known about the context in which Congress was legislating in 1948, particularly with respect to judicial review of administrative action. Specifically, in 1946 Congress passed the Administrative Procedure Act, Pub.L. No. 79-404, 60 Stat. 237 (1946) ("APA"), to provide, *inter alia*, for judicial review of administrative action:

> Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action . . ., shall be entitled to judicial review thereof.

Id. at § 10(a), 60 Stat. 243. Aggrieved disability retirement applicants ostensibly therefore, at least between 1946 and 1948, were entitled to judicial review of Commission decisions under the APA.[6]

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[4] As noted above, § 8347(c) can easily be read to preclude review only of the factual determinations of medical disability. *See* fn. 2, *supra*. The original language, however, is even more susceptible to this construction, as the object of the finality clause was the Commission's "decisions with respect to" its determination of "questions of dependency and disability." Additionally, the specific reference in the next sentence to the Commission's procedures "to determine the facts" of disability reinforces the inference that the language reaches only to factual determinations. Indeed it would take a strained construction to carry the finality language of the original enactment beyond factual determinations of disability and dependency. Since Congress directed in its enactment of Title 5 into law that "there are no substantive changes made by this bill," S. Rep. No. 1380, 89th Cong., 2d Sess., at 20-21 (1966), the court below properly should have focused its inquiry on the precodification version of the finality language. *See Muniz* v. *Hoffman*, 422 U.S. 454, 470 (1975).

[5] The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) also amended § 8347 by adding a new paragraph (d) providing for MSPB review of OPM decisions. This amendment represented merely a codification of then existing Civil Service Commission regulations. *See* 5 C.F.R. § 831.1205 (1978).

[6] While the APA did not create jurisdiction to hear disability retirement matters, jurisdiction was made available by the Tucker Act, 24 Stat. 505 (1887), now codified in pertinent part at 28 U.S.C. §§ 1346, 1491 (1982). Thus

Because of the importance of the Act, Congress also specified that it would be immune from implicit revision:

> No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly.

Id., at § 12, 60 Stat. 244. Neither the 1948 amendment imposing the finality language nor any other amendment "expressly" provided for a modification or superseding of the judicial review provisions of the APA. Since the 1948 amendment could not "supersede or modify" the provisions of the APA without expressly so stating, it could not have affected individuals' rights to judicial review in disability cases. *See Benton* v. *United States*, 488 F.2d 1017, 1024 (Ct. Cl. 1973); *cf.*, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955).

It is axiomatic that repeals by implication are disfavored and that conflicting statutes must be construed whenever possible "to give effect to each . . . while preserving their sense and purpose." *Watt* v. *Alaska*, 451 U.S. at 267; *see, also, Administrator, Federal Aviation Admin.* v. *Robertson*, 422 U.S. 255, 265-266 (1975). Here, even if complete reconciliation of the two provisions is not possible, the least affront to the purposes of the APA is yielded by construing the finality language to reach only to factual conclusions. That the finality provision was adopted so shortly after the enactment of the APA is persuasive evidence that this was exactly Congress' intent.

Importantly, between 1956 and 1980, the finality provision of § 8347(c) was uniformly construed in precisely this fashion, to allow limited judicial review of Civil Service Commission decisions. The Court of Claims in 1962 articulated what is now referred to as the *Scroggins* standard for review of Civil Service Commission decisions on disability retirement matters,

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it was the various district courts, or the Court of Claims, which would have been the "court[s] of competent jurisdiction" "specified by statute" authorized to hear these claims. See *Califano* v. *Sanders*, 430 U.S. 99, 105 n. 6 (1977).

holding that it would set aside such administrative determinations

> where there has been a substantial departure from important procedural rights, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.

Gaines v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962). The Court of Claims continuously applied this standard until it was merged into the Federal Circuit in 1982. *See, e.g., Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 353 U.S. 952 (1968); *Polos* v. *United States*, 621 F.2d 385 (Ct. Cl. 1980). Thus, at least until 1980, § 8347(c) was construed as limiting courts' ability to inquire into the medical facts of disability, but not precluding them from reviewing for misconstruction of governing law and regulation and like errors "going to the heart of the administrative determination."

2. The 1980 amendment

In 1980, Congress amended the finality language of § 8347(c) specifically to provide full judicial review for a small sub-class of disability retirement matters. *See* Pub.L. No. 96-500 (1980). During 1978 and 1979, the House held extensive hearings to examine perceived abuses by federal agencies of fitness-for-duty examinations. *See Use of Physical and Psychiatric Examinations to Determine Fitness for Duty: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. (1978); *RFEHB Plan, Survivor Benefit and Fitness-for-Duty Exams: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. (1979). Congress was concerned that agencies were employing fitness-for-duty exams and involuntary retirement procedures as disciplinary measures, thereby removing federal employees from employment without providing them the benefit of adverse action protections. Thus, to curb this abuse and to insure that all federal employees received their procedural entitlements,

the House proposed to amend § 8347 to provide that all decisions of OPM on retirement matters be subject to judicial review.[7] *See* H.R. 2510, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. H1003 (1979); H.R. Rep. No. 1080, 96th Cong., 2d Sess. (1980).

While the original House bill proposed to remove completely the limiting language of § 8347, the provision ultimately proposed by the House did not reach quite as far. Because OPM believed that full *de novo* review of all disability retirement cases would require excessive judicial involvement, it voiced its disapproval of the proposed H.R. 2510. Significantly, in urging the House to adopt a less expansive measure, OPM testified that full *de novo* review was unnecessary, as applicants already possessed limited appeal rights:

> [I]f there are questions of proper procedure or constitutional issues, these questions may be raised in the Federal court system. Only the question of disability itself, which is a question of medical fact, is actually barred from judicial review by section 8347(c).
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> * * *
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> The courts already may review questions of procedure as distinguished from questions of fact concerning disability itself, and employees are, therefore, not entirely precluded from obtaining judicial review.

RFEHB Plan, *supra*, at 4. Further, Alan K. Campbell, then Director of OPM, submitted to Congress:

> It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, misconstruction of the governing legislation, or

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[7] The House bill as originally proposed sought only to delete the phrase "and not subject to review" from § 8347(c). The House Report makes clear, however, that removal of this phrase was deemed sufficient to allow *de novo* review of these decisions. *See* H. R. Rep. No. 1080, 96th Cong., 1st Sess. 1 (1980); Staff of House Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Forced Retirement Physchiatric Fitness For Duty Exams* 20 (Comm. Print 1978).

> some like error going to the heart of the administrative determination.

H.R. Rep. No. 1080, *supra*, at 8.

Consequently, the House backed away from its complete *de novo* review proposal. Yet to avoid the "adverse effect" of the *Scroggins* limitation of review (*i.e.*, limiting review to statutory and procedural questions), H.R. Rep. 1080 *supra*, at 4, the House amended its proposal to provide *de novo* review only in agency-initiated psychiatric disability cases. Ultimately the House accepted the Senate version of the bill which provided for expanded judicial review of agency-initiated psychiatric disability cases under 5 U.S.C. § 7703. *See* S. Rep. No. 1004, 96th Cong., 2d Sess. (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5986.

In sum, the pertinent legislative history of Pub.L. No. 96-500 persuasively demonstrates that in 1980 Congress did not intend to preclude all judicial review of disability retirement matters other than those initiated by agencies on involuntary psychiatric grounds. Rather, Congress became aware of agency abuse of fitness-for-duty exams and involuntary psychiatric disability procedures; it recognized that the procedural protection available to these individuals (*i.e.* judicial review under the *Scroggins* formula) was inadequate; it proposed initially to repeal the limiting language of § 8347; and, after considering OPM's concerns, ultimately adopted a provision broadening review rights for a certain sub-class of annuity applicants, while leaving the rights of others to be governed by the limited review afforded by *Scroggins*.

3. The intent of Congress

There are two competing constructions of § 8347 presented to this Court: 1) whether the limiting language precludes all judicial review of MSPB decisions on disability matters, as the Eighth Circuit and the court below have held; or 2) whether the limiting language merely prohibits courts on review from inquiring into the medical determination of disability, as

petitioner urges and several other courts have held.[8] All other things being equal, of course, the construction allowing judicial review but precluding inquiry into the medical facts of disability must be accepted, as there is a strong presumption favoring judicial review. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).[9]

The Eighth Circuit, the first court to accept OPM's current argument that § 8347 totally precludes review,[10] found persuasive two sentences from the Senate Report:

> The purpose of H.R. 2510 as amended is to remove the ban to judicial review of certain disability retirement determinations made by the Office of Personnel Management . . .
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> * * *
>
> H.R. 2510, as amended, will remove the current bar to judicial review of such disability retirement determinations . . .

Morgan v. *Office of Personnel Management*, 675 F.2d 196, 200 (8th Cir. 1982) *citing* S. Rep. No. 1004, *supra*, at 1-2.[11] Citing

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[8] *See, e.g., Turner* v. *Office of Personnel Management*, 707 F.2d 1499, 1506 (D.C. Cir. 1983); *Parodi* v. *Merit Systems Protection Board*, 702 F.2d 743, 747 (9th Cir. 1982); *McCard* v. *Merit Systems Protection Board*, 702 F.2d 978, 983 (11th Cir. 1983); *Pitzak* v. *Office of Personal Management*, 710 F.2d 1476, 1478 (10th Cir. 1983); *Lancellotti* v. *Office of Personnel Management*, 704 F.2d 91, 97 (3d Cir. 1983).

[9] While there is a plausible reason for precluding review of medical determinations of disability (*see* H. R. Rep. No. 1080, *supra*, at 3), significantly, at no point in the legislative history is there advanced a reason for disallowing review for procedural and statutory errors in disability cases. No reason is proffered for disallowing this review in these cases while leaving the gamut of other retirement matters fully reviewable, for no reason exists. Because "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible," *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982), the construction adopted by the court below is accordingly suspect to start.

[10] The government has been arguing unsuccessfully at least since 1978 that § 8347(c) precludes judicial review. *See Fancher* v. *United States*, 588 F.2d 803, 806 n. 3 (Ct. Cl. 1978).

[11] It is noteworthy that every portion of the legislative history cited in support of preclusion of judicial review is couched in terms of *removing* the

this language, and inferring from the explicit provision of review in agency-initiated psychiatric disability cases an implicit intent to deny review in all other cases, the Eighth Circuit found the "clear and convincing" intent necessary to defeat judicial review. *Morgan*, 675 F.2d at 199. To the contrary, however, this amendment and its legislative history provide clear and convincing evidence that Congress intended to limit review only of factual determinations and to expand review in agency-initiated psychiatric disability cases.

As a general rule, Congress is presumed to act with knowledge of the judicial constructions of its enactments and, without contrary expressed intent, it is presumed to accept those constructions. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 733 (1975); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 78-79 (1982). This is so because

> [i]t is always appropriate to assume that our elected representatives, like our citizens, know the law.

Cannon v. *University of Chicago*, 441 U.S. 677, 696 (1979). Thus, for example, the fact that Congress revisited § 8347(c) in its consideration and passage of the Civil Service Reform Act in 1978 and left unchanged this "finality" language is evidence that Congress knew of and accepted that section's judicial construction. *See Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977).[12]

With respect to the 1980 amendment of § 8347, however, it is not necesary to indulge this presumption. With its 1980 amendment, Congress addressed what it perceived to be the inappropriately narrow avenue of review available to certain annuity

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ban or bar to judicial review. Significantly, nowhere is there to be found, either in the 1980 legislative history or elsewhere, any language purporting to impose this "bar" or indicating that this language was intended to extend to all review and not just review of factual determinations.

[12] "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change [the judicial] construction of its legislation." *Id.* The same, of course, could be said of Congress' 1966 recodification of the retirement provisions *See* Pub. L. No. 89-554, 80 Stat. 378 (1966).

applicants.[13] Concerned with the "special and unusual restrictions on judicial examination" imposed by § 8347(c), and aware of the "adverse effect" of not allowing review "as if the finality clause were not there," H. R. Rep. 1080 *supra*, at 4, *quoting McFarland* v. *United States*, 517 F.2d 938, 942-43 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1049 (1976), Congress explicitly broadened the appeal rights of a certain sub-class of annuity applicants.

Notwithstanding that Congress could not reasonably be presumed to have intended silently to extinguish the rights of certain individuals while explicitly legislating to broaden the rights of others,[14] the fact that it specifically referred to the judicial construction of § 8347(c) is compelling evidence that it intended to adopt this construction. *Georgia* v. *United States*, 411 U.S. 526, 533 (1973); *Chemehuevi Tribe of Indians* v. *Federal Power Comm'n*, 429 U.S. 395, 410 (1975). Here Congress discussed in depth the judicial construction of § 8347(c); it indicated that this construction was inordinately restrictive and inadequate to protect the rights of a certain sub-class of individuals; and it legislated away that part of the construction it found unacceptable. A more clear-cut example of congressional approbation of a judicial construction is not easily found.

That Congress expressly ratified the *Scroggins* line of authority in its effort to expand judicial review in one area is

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[13] *See Forced Retirement Psychiatric Fitness for Duty Exams*, *supra* at 15.

[14] In his concurring opinion below, Judge Nichols concluded that Congress had doubly-locked the doors to judicial review, once explicitly in § 8347(c) and once implicitly by providing in § 8347(c) that review was unavilable "except to the extent provided under subsection (d) of this section." 718 F.2d 400, 403 (Nichols, J. concurring). The supposition that Congress intended to foreclose all judicial review with its amendment of subsection (c) is conclusively dispelled by the House Report itself. Specifically, the Report states that the new language was intended "to provide an exception to the general rule" of limited review, under which "the Federal courts presently review . . . cases if procedural or constitutional issues are involved." H. R. Rep. No. 1080 *supra* at 5-6. Plainly, Congress intended to open wider, not barricade, the doors to judicial review.

perhaps the most compelling evidence that it did not intend its 1980 amendment of § 8347 to preclude all judicial review and thereby invalidate *Scroggins*. *Georgia* v. *United States*, 411 U.S. at 533. At the very least, however, it casts doubt on the *Morgan* court's, and the Federal Circuit's determination that Congress intended to foreclose judicial review. Because the "right to judicial review of a final agency action will not be cut off" absent "a showing of 'clear and convincing evidence' " of legislative intent, *Abbott Laboratories*, 387 U.S. at 140-41, the existence of this uncertainty alone is sufficient to demonstrate the error of the court below. *See, also, Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); *Dunlop* v. *Bachowski*, 421 U.S. at 567.

Rather than examine the legislative history for the "clear and convincing evidence" of Congressional intent necessary to support its decision, the plurality below instead ignored the "conflicting comments of a few congressmen"[15] and looked only "to what Congress did." 718 F.2d at 400. Yet in so doing, the plurality betrayed its error, for the existence of these "conflicting" congressional statements evinces the absence of "clear and convincing evidence" of congressional intent. Without clear and convincing evidence of congressional intent, judicial review can never be foreclosed.

The bottom line of the plurality's holding appears to be its determination that the Court of Claims decided *Gaines* and *Scroggins* incorrectly and thus by its 1980 amendment Congress could not properly adopt that Court's constructions: "What did not properly exist cannot be expanded." 718 F.2d at 399. The plurality correctly notes that in reenacting legislation Congress need not say "we meant what we said the first time," *id.*, but it ignores the fact that by both tacitly and expressly adopting the judicial construction allowing limited judicial review, Congress has effectively said "we meant what the courts

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[15] Characterizing the language concerning "removing the current bar" as conflicting statements of congressional intent is overstating the matter. The "current bar," as Congress was well aware, was the "special and unusual" limitation imposed by *Scroggins*. *See* H. R. Rep. No. 1080, *supra*, at 4; *see also* fn. 11 *supra*. It was not a complete bar to all review.

have been saying for the last twenty years."[16] That the plurality below would decide *Gaines* and *Scroggins* differently today is of academic interest at best; the resolution of the issues before this Court turns on the intent of Congress, not the hindsight of the Federal Circuit. The axioms this Court has provided for discerning that intent amply demonstrate that the plurality below erred in locking the courthouse doors to applicants for disability retirement.

B. The Administrative Agencies Charged With Implementing § 8347(c) Have Concluded That Review Is Available

In addition to misgauging congressional intent, the court below further erred in failing to accord proper deference to the administrative constructions of § 8347(c). This Court has repeatedly held that

> the construction of a statute by those charged with its administration is entitled to substantial deference.

United States v. *Rutherford*, 442 U.S. 544, 553 (1979). *See, also, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Rather than defer to these constructions or provide a reasoned basis for rejecting them, the plurality below simply ignored the long-standing interpretations of the agencies charged with administering § 8347(c). In so limiting its inquiry, the court below erred.

Until the passage of the Civil Service Reform Act in 1978, the Civil Service Commission was the only agency charged with administering § 8347(c). With the passage of the Reform Act, the Commission was disestablished, with its appeals jurisdiction being transferred to the newly created Merit Systems Protection Board and the remainder of its duties

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[16] As with an administrative construction of an act, once a judicial construction has been " 'fully brought to the attention of . . . Congress and [Congress] has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979), *quoting Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-89 (1940).

transferring to OPM. Thus since 1978, both the MSPB and OPM-arguably have been "charged with administering" § 8347(c). Significantly, both agencies have interpreted § 8347(c) to allow limited judicial review, foreclosing only appellate review of factual determinations.

OPM's construction of § 8347(c) is found in the legislative history of the 1980 amendment. The Director of OPM submitted, both to the Senate and the House, letters stating OPM's views on the proposed amendments. In both letters, the Director stated:

> It is appropriate, therefore that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, misconstruction of the governing legislation, or some like error going to the heart of the administrative determination.

See S. Rep. No. 1004, *supra*, at 4-5; H. R. Rep. No. 1080 *supra*, at 8. Furthermore, in testimony before the House, OPM's Associate Director stated:

> Only the question of disability itself, which is a question of medical fact, is actually barred by section 8347(c).
>
> * * *
>
> The courts already may review questions of procedure as distinguished from questions of fact concerning the disability itself, and employees are therefore, not entirely precluded from obtaining judicial review.

RFEHB Plan, *supra* at 4.

To be sure, OPM took a vastly different position in the court below. The views expressed by its counsel in litigation, however, do not command the respect its contemporaneous explanation of the statute does. *Turner* v. *Office of Personnel Management*, 707 F.2d at 1504. As this Court has noted,

> Congress had delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the

> expertise that can enlighten and rationalize the search for the meaning and intent of Congress.

Investment Company Institute v. *Camp*, 401 U.S. 617, 628 (1971). Thus it cannot be disputed that OPM itself construed the limiting languge of § 8347(c) not as a preclusion of judicial review but only a limitation on the standard of review.

While such an administrative interpretation is ordinarily entitled "substantial deference," *Blum* v. *Bacon*, 457 U.S. 132, 141 (1982); *Quern* v. *Mandley*, 436 U.S. 725, 738 (1978), here even greater weight is due:

> [W]e necessarily attach "great weight" to agency representations to Congress when the administrators "participated in drafting and directly made known their views to Congress in committee hearings."

United States v. *Vogel Fertilizer Co.*, 455 U.S. 15, 31 (1982), *quoting Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). Here OPM voiced its interpretation of the meaning of § 8347(c) not only in committee hearings, but through its Director to both houses of Congress. Under these circumstances OPM's administrative interpretation is compelling.

Unlike OPM, MSPB has consistently maintained that judicial review is not precluded by § 8347(c). MSPB's position that judicial review is available stems from its determination that it adjudicates retirement matters, including disability retirement matters, under 5 U.S.C. § 7701. *See Hien* v. *Office of Personnel Management*, 1 MSPB 396 (1980); *Chavez* v. *Office of Personnel Management*, 6 MSPB 343 (1981). Under 5 U.S.C. § 7703(a)(1), a companion provision of § 7701,

> Any employee or applicant for employment adversely affected by an final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.[17]

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[17] While virtually all disability annuity applicants are former employees by the time their appeals reach the MSPB, it is clear that the reference to "any employee" in § 7703(a)(1) includes "former" employees. *See, e.g., Raichocich* v. *United States Postal Service*, 675 F.2d 417 (D.C. Cir. 1982) (involving

Thus MSPB has consistently advised unsuccessful disability retirement applicants of the "right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703." Petitioner's Appendix at 58a; *see, also, Turner* v. *Office of Personnel Management*, 707 F.2d at 1504.

MSPB's determination that judicial review lies under 5 U.S.C. § 7703, because it is the determination of an agency charged with administering the act, is due substantial deference. *United States* v. *Rutherford*, 442 U.S. at 553; *Udall* v. *Tallman*, 380 U.S. at 16. Yet even beyond this substantial deference,

> [p]articularly is respect due when the administrative practice at stake "involves a construction of a statute by the [agency] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Power Reactor Development Co. v. *International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961), *quoting Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). From its inception the MSPB has determined that unsuccessful disability retirement applicants are entitled to judicial review. This determination should not be lightly dismissed.

C. The Court Below Erroneously Construed § 8347(c) To Raise Serious Constitutional Conflicts

A statute must be construed, whenever possible, to avoid raising serious constitutional questions. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534 (1962) (plurality opinion); *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 480, 507 (1978). Yet the construction of § 8347(c) adopted by the court below, abrogating as it does certain individuals' entitlement to seek redress in

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reemployment rights). In removal cases, which indisputably are covered by §§ 7701 and 7703, all appellants are "former" employees, for an appeal cannot be taken to the MSPB until *after* the effective date of the action. *See* 5 C.F.R. § 1201.22(b)(1984); *Bronger* v. *Office of Personnel Management*, No. 83-1349, slip op. at 10-11 (Fed. Cir. July 26, 1984).

Article III Courts, does raise such significant constitutional problems. Since it hardly can be said that the construction adopted by the court below was unambiguously mandated, and because another construction without constitutional implications was at least equally tenable, the court was required to reject the construction it adopted. By failing to adhere to this established jurisprudential principle, the court unnecessarily and improperly raised serious constitutional questions. By so doing, it erred.

The Federal Circuit summarily dismissed the constitutional problems raised by its statutory construction by characterizing disability annuities as "gratuities." 718 F.2d at 392. According to that court, the annuity was a mere gift that could be conditioned in any way Congress saw fit. *Id.* The court, however, plainly misconceived the nature of the interest at stake.

Congress intended civil service annuities as a form of deferred compensation. Representative Hammil, one of the active proponents of the original retirement act, stated:

> This pension bill must not be regarded as governmental generosity. Pensions are not gratuities and should not be considered as such. They should be looked upon as deferred wages—a payment of wages which were not disbursed at the time they were earned.

59 Cong. Rec. H6300 (1920). Furthermore, the pertinent statutory provision confirms that Congress conceived and established retirement benefits as deferred compensation:

> Each employee or Member is deemed to consent and agree to [deductions for contributions to the retirement fund] from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or Member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment *except the right*

> *to the benefits to which the employee or Member is entitled under this subchapter.*

5 U.S.C. § 8334(b) (1982) (emphasis added)[18]

Considering that federal employees contribute to the retirement fund and are entitled to an annuity only after their interests vest, the entitlement to this deferred compensation is a property right, not a gratuity. *See Kizas* v. *Webster*, 707 F.2d 524, 536 (D.C. Cir. 1983), *cert. denied* 104 S.Ct. 709 (1984); *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1594 (1984). Of course, there is a significant constitutional question raised by foreclosing judicial review of the denial, or taking, of these rights, just as there would be if the government sought to deny a Federal employee the other earned entitlements of his or her position. *United States* v. *Larionoff*, 431 U.S. 864, 879 (1977). Indeed, as Justice Brennan recently noted,

> when Congress assigns [the adjudication of certain property rights] to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review.

Northern Pipe Line Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opiniuon) *citing Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 445 n.13 (1977).

Again, the court below erred in forcing the resolution of this constitutional conflict when "a construction of the statute [was] fairly possible by which the question may [have been] avoided." *United States* v. *Clark*, 445 U.S. 23, 27 (1980). The court's action was especially anomalous because of this Court's recognition that the issue that the Federal Circuit unnecessarily raised is "one of the most confusing and controversial areas of constitutional law." *Northern Pipe Line Constr. Co.*, 458

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[18] This language derives from Section 9 of the original act and is in substance unchanged. *See* 41 Stat. 618.

U.S. at 93 (White, J. dissenting) *citing Glidden Co.* v. *Zdanok*, 370 U.S. at 534.

More specifically, the issue unnecessarily raised is whether the separation of powers doctrine prohibits Congress from delegating to an executive agency the power conclusively to determine questions of statutory entitlement when preexisting, constitutionally cognizable, property interests are at stake. In determining if the Constitution requires that judicial review of an administrative decision must be made available, it is the nature of the interest at stake which is controlling. *Northern Pipe Line Constr. Co.*, 458 U.S. at 69 n.23 *quoting Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1955).[19]

There are, of course, innumerable individual interests that are affected by governmental action. And, it is only at the extremes that the question of access to judicial review is easily answered. Thus, for example, when the determination of contractual rights is at stake, Art. III recourse must be available. *See Atlas Roofing Co., Inc.*, 430 U.S. at 450 n.7; *Crowell* v. *Benson*, 258 U.S. 22, 50-51 (1932). At the other extreme, when the interests at stake are those arising only out of the government interacting in its sovereign capacity with individuals, and where there are no independent property considerations present, the Constitution may not require that access to judicial review be made available. *See United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

The interest at stake here is a preexisting, constitutionally protected property interest. Indeed, what cannot be ignored is

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[19] The attempt to resolve these questions of review through characterization of the right involved as either "public" or "private" has proved to be of limited utility. *See Northern Pipe Line Constr. Co.*, 458 U.S. at 115 (White, J. dissenting) (suggesting that the distinction between private and public rights is inconsequential so long as Art. III appellate review is available to insure the proper separation of powers.) *See, also*, Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation Of Powers*, 97 Hav. L. Rev. 778 (1984) (suggesting that a balancing approach utilizing the criteria set out in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), would resolve the constitutional conflict.)

that the entitlement to a civil service annuity, and particularly a disability annuity, is an earned entitlement, in the nature of a contractual right to compensation. *See Kizas* v. *Webster*, 707 F.2d at 536; *American Postal Workers Union* v. *United States Postal Service*, 707 F.2d at 554. The significance of the fact that we are here dealing with a form of compensation, and, therefore, a property right that cannot be extinguished without judicial review, has recently been explained by this Court in an analogous context:

> No one disputes that Congress may prospectively reduce the pay of [Federal employees], even if that reduction deprived [employees] of benefits they had expected to be able to earn. It is quite a different matter, however, for Congress to deprive [an employee] of pay due for services already performed, but still owing.

United States v. *Larionoff*, 431 U.S. at 879, citations omitted. Because retirement benefits represent payment for services rendered in the past, they are part and parcel of employees' constitutionally protected compensation. Disability annuities, in essence disability insurance, are also part of that deferred compensation; the assurance of a guaranteed income in the event of medical disability, an additional *quid pro quo* for contributing to the retirement fund for five years.

It may be that certain disputes "which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" need not be reviewable in Art. III courts. *Crowell* v. *Benson*, 285 U.S. at 50. Disputes concerning entitlement to earned retirement benefits, however, clearly are of a different order. Importantly, actions seeking entitlement to earned retirement benefits are not suits against the government "in its sovereign capacity." *Atlas Roofing Co.*, 430 U.S. at 450. Rather, such suits seek to enforce preexisting property rights affected, but not created, by statute, that arise as a result of the government acting in its proprietary capacity, as employer. As such, disputes of this nature are of the type traditionally subject to suits at common law or equity. *Cf.*, *Semaan* v. *Mumford*, 335 F.2d 704, 706 n.6

(D.C. Cir. 1964). It is well-established that access to Art. III review for cases of this sort must not be foreclosed. *Crowell* v. *Benson*, 285 U.S. at 50.

While an individual's entitlement to an annuity in a specific amount is dependent on the statutory scheme, his or her right to be paid for services rendered and the right to the "benefit of the bargain"[20] are independent rights commanding the full panoply of judicial protections. The court below failed to give proper effect to this fact by summarily dismissing the obvious constitutional problems that its construction of § 8347(c) created.

The foregoing demonstrates, at a minimum, that any construction of § 8347(c) that precludes all recourse to Art. III review raises very serious constitutional problems. Indeed, we believe that the constitutional infirmity of such a statutory scheme is clear from the authorities discussed above. This issue, however, need not and should not be definitively resolved.[21] For, again, once it had been shown that "a construction of the statute [was] fairly possible by which the question may [have been] avoided," *United States* v. *Clark*, 445 U.S. at 27, the court below was required to adopt it. This showing has easily been made here, and the Federal Circuit's foreclosure of review, notwithstanding that showing, was error. On this ground alone, reversal is required.

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[20] Federal employes who entered service before January 1, 1984 were, as a condition of employment, obligated to contribute to the retirement fund, deductions from their salary being mandatory under 5 U.S.C. § 8334(b). For their contribution to the retirement fund they earned the right to receive an annuity as prescribed by Congress at the time their interests vest. *See American Postal Workers Union*, 707 F.2d at 554.

[21] If the Court concludes that its decision here must turn on definitive resolution of the constitutional issues that are implicated—and it should not—fuller briefing of the questions is obviously in order. *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 534, n.7 (1962).

IV. CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

IRVING KATOR
Counsel of Record

JOSEPH B. SCOTT
JAMES H. HELLER
MICHAEL J. KATOR

August, 1984

No. 83-5954

Office - Supreme Court, U.S.
FILED
JUL 26 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 15, 1983.
CERTIORARI GRANTED JUNE 18, 1984.

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RELEVANT DOCKET ENTRIES

Date	*PROCEEDING*
1981	
6/10	Filed petition for review in Court of Claims
7/17	Filed record in Court of Claims
11/5	Filed petitioner's opening brief in Court of Claims
1982	
10/1	Case ordered transferred to U.S. Court of Appeal for Federal Circuit
1983	
4/11	Filed respondent's motion to dismiss petitioner's appeal
4/27	Filed petitioner's opposition to respondent's motion to dismiss petitioner's appeal
5/13	Filed respondent's reply brief
9/22	Filed decision of Court of Appeal granting respondent's motion to dismiss
9/22	Judgment filed dismissing appeal for lack of jurisdiction

EDITOR'S NOTE

PAGES 3 thru 19 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FROM MERIT SYSTEMS PROTECTION BOARD

UNITED STATES CIVIL SERVICE COMMISSION

WAYNE LINDAHL V.
OFFICE OF PERSONNEL MANAGEMENT

DISABILITY RETIREMENT EXAMINATION

APPT: 1/30/78 1400

REPORT OF MEDICAL EXAMINATION FOR DISABILITY RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

A. IDENTIFYING INFORMATION

1. NAME OF PERSON EXAMINED		2. DATE OF BIRTH
LINDAHL, WAYNE (NMN)	Employee No. 479-18-5184	07/02/26
3. POSITION TITLE		4. CLAIM NO.
Police Officer		

B. MEDICAL HISTORY

1. COMPLAINTS

Chronic cough, shortness of breath, weakness, etc.

2. ONSET AND HISTORY OF DISABILITY

Employee states that he went to the Allergy Clinic at Kaiser in Oakland, in 1971 or 1972 because of recurrent colds, coughs, chills and fever. Since that time, he has been seen by various doctors in the Kaiser Organization and has been treated with antibiotics on a continuing basis. Currently he is on Tetracycline, but at times has been on Ampicillin. In addition, he takes at least 4 Aspirins a day and takes Contact to control sputum. He is bothered by exhaust fumes from traffic and by welding fumes and paint fumes when assigned to industrial areas. He was a Welder for 20 months and worked in the Sailloft for about 8 months since coming to work at Mare Island in 1968.

Past history includes a hospitalization for a bleeding ulcer in 1960.

C. PHYSICAL FINDINGS

Describe the clinical findings in detail as fully as possible, particularly with respect to the condition which is considered disabling. Your complete and objective report of medical examination is of the utmost importance to the Government and the person identified above.

1. HEIGHT	2. WEIGHT	3. TEMPERATURE	4. MUSCULAR DEVELOPMENT	5. PULSE	6. RESPIRATION
6' 1"	230	97.6	Good	80	20

7. NUTRITION	8. POSTURE	9. GAIT	10. GENERAL APPEARANCE	11. BLOOD PRESSURE
Good	Good	Good	Good	SYSTOLIC 130 DIASTOLIC 90

12. COMPLETE PHYSICAL FINDINGS (CONTINUE ON OTHER SIDE)

Employee is alert and orineted. He is coughing (hacking) throughout the examination.
HEENT: Negative. The thyroid is not palpable.
CHEST: Auscultation of the heart shows a regular rhythm with no murmurs.
are clear.
ABDOMEN: Soft. There are no palpable masses or organs.
GENITALIA: Negative.
EXTREMITIES: The upper and lower extremities are well developed and equal in appearance and there is a full range of motion.
SPINE: Negative.

ALSO COMPLETE REVERSE SIDE OF THIS REPORT

12. PHYSICAL FINDINGS (CONTINUED)

NEUROLOGICAL: Negative.
VISUAL ACUITY: Is corrected to 20/20 bilaterally.

(IF ADDITIONAL SPACE IS REQUIRED, PLEASE CONTINUE ON SEPARATE SHEET)

D. DIAGNOSIS

1. ACUTE AND CHRONIC BRONCHITIS.
2. WEAKNESS AND DIZZINESS.

Employee is probably disabled for his position and for any work requiring exposure to significant levels of stress or to respiratory irritants.

E. CONCLUSIONS

NOTE: Under the civil service retirement system, the term disability means disabled for useful and efficient service in the grade or class of position last occupied by the employee, by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct.

1. IS EMPLOYEE DISABLED FOR THE POSITION NAMED IN PART A, ITEM 3?	2. DATE DISABILITY BEGAN?	3. HOW LONG IS DISABILITY EXPECTED TO LAST?	4. IS DISABILITY DUE TO VICIOUS HABITS, INTEMPERANCE OR WILLFUL MISCONDUCT?
[XX] YES [ ] NO	Present	Indefinite	[ ] YES [XX] NO

F. PHYSICIAN'S NAME AND ADDRESS

1. TYPE OR PRINT PHYSICIAN'S NAME	2. PHYSICIAN'S SIGNATURE
JOHN P. WILLIAMS, M. D.	[signature]
3. PHYSICIAN'S ADDRESS (Including ZIP Code) [illegible] DISPENSARY [illegible] DEPARTMENT [illegible] ISLAND NAVAL SHIPYARD [illegible] CALIFORNIA 945[illegible]	4. DATE February 13, 1978

FROM MERIT SYSTEMS PROTECTION BOARD

M.R. #1598322

KAISER PERMANENTE MEDICAL CENTER

DISCHARGE SUMMARY

NAME: LINDAHL, Wayne

B. ALLAN, M.D.

ADMITTED: 1/23/79
DISCHARGED: 2/1/79

Admitted through Emergency because of a feeling of chest pressure and pain diffusely over the whoe of his anterior chest, beginning at 7:00 PM on the night of admission and continuing for about 12 hours. There was mild malaise and a little sweating and nausea with the pain but no faintness. He has given a history of similar chest oppression over the last few months, more moderately over the last week.

PAST HISTORY: Severe chronic recurring bronchitis attributable probably to his exposure to chemical fumes, etc. at Mare Island Naval Shipyards. He has had various neurotic episodes and anxiety attacks, bleeding peptic ulcer in 1960 requiring transfusion, kidney stone a long time ago, and probably chronic depression.

Medications—he takes Ampicillin or Tetracycline on a prn basis for his bronchitis.

PHYSICAL EXAMINATION: Patient, apart from his usual depressed appearance, has little to find.

TREATMENT AND PROGRESS IN HOSPITAL: He was observed in hospital, has various episodes of chest pressure and some dry retching.

LABORATORY DATA: Urinalysis normal. Hemoglobin 16.6 with Crit of 45. White cell count 5,800. Normal electrolytes, BUN and Glucose. Cholesterol 250. Cardiac enzymes remained normal and the M Bands, CPK was normal. VDRL negative. EKG nonspecific abnormality of the STTwave which fluctuated slightly during the admission.

DISPOSITION: He was discharged to rest for a week and halfe to be followed in clinic and treadmill was scheduled. Medications—nil apart from Ampicillin on prn.

DISCHARGE DIAGNOSIS: Chest pain, cause undetermined. Chronic Bronchitis. Status post peptic ulcer disease.

B. ALLAN, M.D.

BA/ad

FROM MERIT SYSTEMS PROTECTION BOARD

THE PERMANENTE MEDICAL GROUP
1330 CUTTING BOULEVARD
RICHMOND, CALIFORNIA 94804 • (415) 234-3131
DONALD P. FISCHER, M.D.
Physician-in-Chief

June 26, 1979

Department of the Navy,
Naval Support Activity,
Mare Island,
Vallejo, CA 94592
Att'n: Administrative Assistant, Code 02.

RE: LINDAHL, Wayne
MR#: H-1598322
File No: A13-505919

Gentlemen:

Mr. Lindahl continues to have recurrent attacks of disabling bronchitis and exhibits extreme irritability to his bronchial tree when subjected to pollutants or various other irritants.

Acute bronchial irritation and inflammation may be caused by mineral and vegetable dusts of various kinds, paint fumes, glue, solvents, strong acid fumes, tobacco smoke, and numerous other irritants including exhaust fumes.

It continues to be my opinion that because of the ubiquitous nature of these pollutants in the work atmosphere he is incapable of working. He was placed on the above restrictions starting June 12, 1979 for an indefinite period of time. These restrictions include no overtime and no heavy exertion.

Sincerely,

/s/ Beverley C. Allan

BEVERLEY C. ALLAN, M.D.
Department of Internal Medicine.

BCA:pb

cc: Kenneth Carlson, Esq.
Office of Workers' Compensation Programs.
Central Business Office
File

FROM MERIT SYSTEMS PROTECTION BOARD

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

In Reply Refer To
02C:CB:jlf
12752
02C/213

4 Sep 1979

From: Security Officer
To: Wayne (NMN) Lindahl, Police Officer, Employee Number 479-18-5184

Subj: Advance Notice of Proposed Separation—Disability

Ref: (a) FPM Chapter 752
(b) FPM Supplement 752
(c) FPM Chapter 306
(d) FPM Chapter 339

Encl: (1) Copy of your Position Description Number 78-31-7/43

1. *Nature of Action.* This is to inform you that it is proposed to separate you from employment at this Activity in accordance with reference (a) through (d). This action is being proposed because your physical condition has disabled you to such an extent that you are unable to perform the full range of duties required of your position as a Police Officer.

2. *Effective Date.* Your proposed separation, if found warranted, will not be effected before a notice period of thirty (30) full calendar days has expired. The notice period begins the day following your receipt of this notice.

3. *Reason for Action.* The specific facts and reasons supporting this proposed separation are as follows:

a. The full range of duties required to be performed by you as a Police Officer are contained in enclosure (1).

b. On 25 June 1979 your private physician, Dr. Beverley C. Allan wrote a statement certifying you have recurrent attacks of disabling bronchitis and you exhibit extreme irri-

tability to your bronchial tree when you are subjected to pollutants or various other irritants. She went on to list the irritants which include vegetable dusts of various kinds, paint fumes, glue, solvents, strong acid fumes, tobacco smoke, and exhaust fumes. She added, it continues to be her opinion that because of the ubiquitous nature of these pollutants in the work atmosphere you are incapable of working. Dr. Allan further stated you were to work no overtime and no heavy exertion.

c. Dr. J.P. Williams of the Mare Island Naval Shipyard Industrial Dispensary has evaluated your physical qualifications to effectively perform the full range of duties as a Police Officer. Your capacity to perform these duties was found to be as follows:

ENVIRONMENTAL AND FUNCTIONAL FACTORS

No capacity—Usual overtime work, exhaust fumes, paint fumes, dust, silica, asbestos, fumes, smoke or gases, and solvents (degreasing agents).

Partial capacity—Moderate lifting 15-44 lbs. and moderate carrying 15-44 lbs.

d. Because of your physical condition, it is not possible to assign you to the full range of duties required of a Police Officer at this Activity.

e. Since you occupy a position which provides continuing services around the clock, it is not possible for this Activity to permit the position to remain unfilled.

f. Placement in another position in the Activity has been considered; however, there is no vacant position for which you are technically and physically qualified in which you can be placed.

4. *Reply*. You may reply orally and in writing to this Advance Notice of Proposed Separation—Disability and you may furnish affidavits in support of your reply. In addition, you are entitled to be representated by an attorney or other representative. Your response and any relevant material must be submitted not later than ten (10) calendar days from the date of this advance notice and shall be addressed to the Security Officer, Naval Support Activity, Mare Island, Vallejo, California 94592. Full consideration

will be given to any reply you may make. The referenced material which supports this advance notice may be reviewed in the Personnel Office, Code 02C, Building 851. You will be allowed a maximum period of four (4) hours of official time to review this material.

RAY C. NIEMAN

I HEREBY CERTIFY RECEIPT OF ORIGINAL CORRESPONDENCE ON AUG. 5, 1979

(Date)

WAYNE LINDAHL 479185184

(Name) (Employee Number)

FROM MERIT SYSTEMS PROTECTION BOARD

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

In Reply Refer to:
02C:CB:jlf
12752
Ser 02C/227
17 Sep 1979

From: Commanding Officer
To: Wayne (NMN) Lindahl, Police Officer, Employee Number 479-18-5184

Subj: Notice of Decision to Effect Separation—Disability

Ref: (a) FPM 752
(b) FPM 339

Encl: (1) Copy of Advance Notice of Proposed Separation—Disability 02C:CB:jlf 12752 02C/213 of 4 Sep 79
(2) Appeal Rights

1. *Decision.* In accordance with references (a) and (b), you are hereby notified of my decision to effect your separation from employment at this Activity.

2. *Effective Date.* This separation will be effected on 5 October 1979.

3. *Reason for Action.* This separation is being effected for your inability to perform the full range of duties of your rating, Police Officer, because of physical disability.

4. *Restatement of Reason.* The reason upon which this separation action is based is restated in enclosure (1).

5. *Findings in Review of Reason.* Enclosure (1) notified you of your right to reply personally and in writing to the Advance Notice of Proposed Separation—Disability and of your right to furnish affidavits in support of your reply.

A thorough review has been made of the reason for this action as contained in enclosure (1). After careful consideration of all available evidence, I find that the reason for this action is fully supported and sustained, and your separation

is warranted. Since you did not reply, my decision is based on evidence of record.

6. *Clearance.* Your identification badge and all government tools and equipment charged to you must be returned and a clearance slip completed before any final monies due you may be issued.

7. *Appeal Rights.* Your rights to appeal this decision are contained in enclosure (2).

/s/ J. K. Nunneley
J. K. NUNNELEY

APPEAL RIGHTS

You may appeal at any time after receipt of this decision but not later than twenty (20) calendar days after the effective date of the action. Your right of appeal is as follows:

You may appeal to the Merit Systems Protection board (MSPB), San Francisco Field Office, 525 Market Street, San Francisco, California 94105. The appeal shall be in writing and shall set forth your reasons for contesting the adverse action, with such proof and pertinent documents as you are able to submit. You should also indicate whether or not a hearing is desired. The attached form is provided for your convenience however, you are *not* required to utilize the form.

The decision is MSPB is final. However, either party to the appeal may petition MSPB to reopen and reconsider the decision.

If you have questions concerning your appeal rights and the appeal procedure, you should contact Carolyn Biddinger, Code 02C, extension 2122 or 4417.

FROM MERIT SYSTEMS PROTECTION BOARD

APPLICATION FOR RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

(USE ONLY IF SEPARATED ON OR AFTER OCTOBER 20, 1969)

To Avoid Delay—1. Read ...ormation Carefully; 2. Complete Application in Full; 3. Typewrite or Print in Ink

A. IDENTIFYING INFORMATION

1. NAME (Last) (First) (Middle)	2. LIST ALL OTHER NAMES YOU HAVE USED
LINDAHL, Wayne (NMN)	None

3. ADDRESS (Including ZIP code)	4. PHONE NUMBER (Including Area Code)	5. DATE OF BIRTH (Month) (Day) (Year)	6. SOCIAL SECURITY ACCOUNT NUMBER
2685 Magee Ave. San Pablo, CA 94806	415 758-9521	7-2-26	479-18-5184

7A. ARE YOU A CITIZEN OF THE UNITED STATES OF AMERICA?	7B. IF "NO", OF WHAT COUNTRY ARE YOU A CITIZEN?
[X] YES [ ] NO	S

8A. ARE YOU MARRIED [X] YES [ ] NO	8B. IF "YES" GIVE THE FOLLOWING INFORMATION			
WIFE'S OR HUSBAND'S NAME (First) (Middle)	HER (OR HIS) BIRTH DATE (Month) (Day) (Year)	HER (OR HIS) SOCIAL SECURITY ACCOUNT NUMBER	DATE OF MARRIAGE (Month) (Day) (Year)	PLACE OF MARRIAGE (City) (State)	MARRIAGE PERFORMED BY [X] CLERGYMAN OR AGENCY OF THE PEACE [ ] OTHER (Specify)
Mary Lou	3 - 3- 28	546-36-1728	12-28-50	Richmond, CA	

9A. DO YOU HAVE ANY UNMARRIED CHILDREN UNDER AGE 22 (Or over age 22 and incapable of self support because of a disability incurred before age 18)? [ ] YES [X]

9B. IF "YES" LIST NAME AND DATE OF BIRTH OF EACH CHILD. WRITE THE WORD "DISABLED" AFTER CHILD'S NAME WHERE APPLICABLE

CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)	CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)

B. CIVILIAN AND MILITARY SERVICE

1. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION, AND ADDRESS, INCLUDING ZIP CODE	2. DATE OF FINAL SEPARATION (Month) (Day) (Year)	3. APPROXIMATE YEARS OF FEDERAL SERVICE CIVILIAN	MILITARY
Naval Support Activity 94592 05 Mare Island Naval Shipyard, Vallejo, CA	Oct - 5- 1979	12 YRS	7 YRS 6 MOS

4. TITLE OF LAST POSITION: Police Officer, GS-5

5. DO YOU HAVE FEDERAL EMPLOYEES GROUP LIFE INSURANCE?	6. IF YOU HAVE REGULAR LIFE INSURANCE, DO YOU ALSO HAVE OPTIONAL LIFE INSURANCE?	7A. HAVE YOU BEEN ENROLLED IN A PLAN UNDER THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM SINCE YOUR FIRST OPPORTUNITY TO ENROLL OR FOR AT LEAST FIVE YEARS IMMEDIATELY BEFORE YOUR RETIREMENT?	7B. IF "YES" PLEASE LIST YOUR CURRENT: CARRIER CONTROL NUMBER	ENROLLMENT CODE NUMBER
[X] YES [ ] NO	[ ] YES [X] NO	[X] YES [ ] NO	K+I SERVICE-Admin V598322	592 SMI-SNGL

8. COMPLETE THE SCHEDULE BELOW IF YOU HAVE PERFORMED ACTIVE DUTY THAT TERMINATED UNDER HONORABLE CONDITIONS IN ANY OF THE FOLLOWING SERVICES (A) ARMY, NAVY, MARINE CORPS, AIR FORCE, OR COAST GUARD OF THE UNITED STATES; OR (B) REGULAR CORPS OR RESERVE CORPS OF THE PUBLIC HEALTH SERVICE AFTER JUNE 30, 1960; OR (C) AS A COMMISSIONED OFFICER OF THE COAST AND GEODETIC SURVEY AFTER JUNE 30, 1961; OR (D) AS A COMMISSIONED OFFICER OF THE ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION. ATTACH A COPY OF YOUR DISCHARGE CERTIFICATE OR OTHER CERTIFICATE OF ACTIVE MILITARY SERVICE, IF AVAILABLE

BRANCH OF SERVICE	SERIAL NUMBER	DATE OF ENTRANCE ON ACTIVE DUTY	DATE OF SEPARATION FROM ACTIVE DUTY	LAST GRADE OR RANK	ORGANIZATION AT DISCHARGE (Div., Regt., Co., etc.)
U. S. Navy	957 86 36	NOV 14-1944	6 APR 46	SEAMAN 1st Class	USNTS MM 334 Nav. Ad. Unit 87
" " "	" " "	Oct 26 1947	26 Oct 1950	" "	" " "
" " "	" " "	27 Oct 50	16 Dec 1953	Metalsmith 2nd	Alleged Sea

9A. ARE YOU A MILITARY RESERVIST (Either Active or Inactive)?	9B. ARE YOU IN RECEIPT OF OR HAVE YOU EVER APPLIED FOR MILITARY RETIRED PAY? (Retired pay does not include V.A. pension or compensation.)	9C. IF "YES" WERE YOU RETIRED FROM A RESERVE COMPONENT UNDER CHAPTER 67, TITLE 10, USC? (Formerly Title III Public Law 90-810)
[ ] YES [X] NO	[ ] YES [X] NO	[ ] YES [ ] NO

C. DISABILITY INFORMATION (Only Applicants for Total Disability Retirement Will Complete This Part)

1. BRIEFLY DESCRIBE YOUR DISABILITIES, STATE WHEN OCCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION (ATTACH ADDITIONAL COMMENTS ON PLAIN SHEET OF PAPER, IF NECESSARY.) ALSO, STATE MONTH AND YEAR IN WHICH YOU BECAME TOTALLY DISABLED. Accumulative PULMANARY-CHRONIC BRONCHITIS - SEVERE Co-SH and LEG FATIGUE - TOTAL EXHAUSTION SWEATING - SENSITIVE TO HOT-COLD TEMPCHANGES PHYSICAL EXHAUSTION - TIRE VERY EASILY. LUNG PAINS HEART ATTACK - CHRON. CONGESTIVE OFF WORK-FREQUENT DOCTORS VISITS

D. OTHER CLAIM INFORMATION MEDICARE ALL THIS Time

1A. HAVE YOU EVER RECEIVED OR MADE APPLICATION FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT?	1B. IF "YES" STATE THE NUMBER OF YOUR COMPENSATION CLAIM AND THE PERIOD FOR WHICH YOU RECEIVED COMPENSATION: CLAIM NUMBER	FROM (Mo.) (Day) (Year) TO (Mo.) (Day) (Year)
[X] YES [ ] NO	A13-505919	UNDER ADJUDICATION 25 June 1979

2A. HAVE YOU PREVIOUSLY FILED ANY APPLICATION UNDER THE CIVIL SERVICE RETIREMENT SYSTEM, INCLUDING APPLICATION FOR RETIREMENT, REFUND, DEPOSIT OR REDEPOSIT, OR VOLUNTARY CONTRIBUTIONS?	2B. IF "YES" INDICATE THE TYPE(S) OF APPLICATION AND GIVE THE CLAIM NUMBER(S) IF KNOWN	CLAIM NUMBER(S)
[X] YES [ ] NO	[X] RETIREMENT [ ] DEPOSIT OR REDEPOSIT [ ] REFUND [ ] VOLUNTARY CONTRIBUTIONS	054 811 576

3A. DO YOU HAVE LIFE INSURANCE THROUGH A FORMER EMPLOYEE BENEFICIAL ASSOCIATION FOR WHICH YOU NOW PAY PREMIUMS TO THE CIVIL SERVICE COMMISSION?	3B. IF "YES" GIVE YOUR ACCOUNT NUMBER
[ ] YES [X] NO	

4A. HAVE YOU EVER BEEN EMPLOYED UNDER ANOTHER RETIREMENT SYSTEM FOR FEDERAL OR DISTRICT OF COLUMBIA EMPLOYEES?	4B. IF "YES" GIVE THE NAME OF THE OTHER RETIREMENT SYSTEM
[ ] YES [X] NO	

INDICATE, BY SIGNING YOUR INITIALS IN THE APPROPRIATE BOX BELOW, THE TYPE OF ANNUITY YOU WANT TO RECEIVE. READ THE EXPLANATIONS AND CONSIDER THE MATTER CAREFULLY. NO CHANGE WILL BE PERMITTED AFTER AN ANNUITY HAS BEEN GRANTED. IF YOU WANT AN ANNUITY WITH A SURVIVOR BENEFIT, BE SURE TO GIVE THE OTHER INFORMATION CALLED FOR.

F. TYPES OF ANNUITY: MARRIED APPLICANTS ONLY

1. ANNUITY WITH SURVIVOR BENEFIT TO WIDOW OR WIDOWER

INITIALS: W.F.

- If you are married, you will receive this type of annuity unless you choose the annuity in F. 2.

SPECIFY THE PORTION OF YOUR ANNUITY YOU WANT USED AS THE BASE FOR YOUR WIDOW'S (OR WIDOWER'S) SURVIVOR ANNUITY.

If you want all your annuity used as the base for the survivor benefit, write the word "all" in the box below. If you want only part of your annuity used as the base for the survivor benefit, write the yearly amount of your annuity you want used.

$ all

THE SURVIVOR'S ANNUITY WILL BE 55% OF ALL OR WHATEVER PORTION OF YOUR ANNUITY YOU SPECIFY AS THE BASE FOR HER (OR HIS) BENEFIT.

- The annuity payable to you during your lifetime will be reduced by 2½% of any amount up to $3,600 a year used as the base for the survivor benefit, plus 10% of any amount over $3,600 so used.
- If your wife (or husband) should die before you, no change in type of annuity will be permitted, your annuity will not be increased, nor may you name any other person as survivor.
- The survivor's annuity will not begin until your death.

2. ANNUITY WITHOUT SURVIVOR BENEFIT

INITIALS:

(I do not desire my wife (or husband) to receive a survivor annuity benefit after my death.)

- If you choose this type, your wife (or husband) cannot be paid a survivor annuity after your death.
- This type provides annuity payments to you only.

G. TYPES OF ANNUITY: UNMARRIED APPLICANTS ONLY (Including Widowed and Divorced)

1. ANNUITY WITHOUT SURVIVOR BENEFIT

INITIALS:

47

- If you are not married, you will receive this type of annuity unless you choose the annuity in G. 2.
- This type provides annuity payments to you only.

2. ANNUITY WITH SURVIVOR BENEFIT TO NAMED PERSON HAVING AN INSURABLE INTEREST

INITIALS:

SPECIFY THE NAME, RELATIONSHIP, DATE OF BIRTH, AND SOCIAL SECURITY ACCOUNT NUMBER OF THE PERSON YOU WISH TO RECEIVE THE SURVIVOR ANNUITY

NAME OF PERSON (First, middle, last)

RELATIONSHIP	DATE OF BIRTH (Mo., day, yr.)
	SOCIAL SECURITY ACCOUNT NUMBER

SEE UNMARRIED EMPLOYEES UNDER INFORMATION REGARDING SURVIVOR ANNUITIES ON THE ATTACHED INFORMATION SHEET FOR EXPLANATION OF REDUCTION IN YOUR ANNUITY.

- This type is available to all retiring *unmarried* employees who are *in good health*.
- It provides a reduced annuity to you and a survivor annuity to the person named as having an insurable interest.
- The survivor's annuity will not begin until your death.
- The survivor's annuity will be 55% of the reduced annuity you receive.
- If you choose this type of annuity you will have to undergo a medical examination which will be arranged by the Civil Service Commission at no cost to you.
- If the person named as having an insurable interest should die before you, no change in type of annuity will be permitted, your annuity will not be increased, nor may you name any other person as survivor.

H. CERTIFICATION OF APPLICANT

WARNING.—Any intentional false statement in this application or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years, or both (18 U.S.C. 1001).

I hereby certify that all statements made in this application are true to the best of my knowledge and belief.

Oct. 9-1979 (DATE) wayne Kinkaid (SIGNATURE OF APPLICANT)

I. FOR USE OF EMPLOYING AGENCY (See FPM Supplement 831-1 for instructions.)

CHECK APPROPRIATE BOX:

☐ INDIVIDUAL RETIREMENT RECORD, SF 2806, AND REGISTER OF SEPARATIONS AND TRANSFERS, SF 2807, ARE ATTACHED.

☐ INDIVIDUAL RETIREMENT RECORD, SF 2806, WAS SENT TO U.S. CIVIL SERVICE COMMISSION ON _____ (DATE) WITH REGISTER OF SEPARATIONS AND TRANSFERS, SF 2807, NO. _____.

NAME OF AGENCY PERSON WHO CAN FURNISH ADDITIONAL INFORMATION ABOUT THIS APPLICATION, IF NECESSARY (Type or print)	SIGNATURE OF RESPONSIBLE AGENCY OFFICIAL	
	OFFICIAL TITLE	DATE
TELEPHONE NUMBER, INCLUDING AREA CODE	DEPARTMENT OR AGENCY	

OFFENSES BARRING ANNUITY PAYMENTS: Title 5 USC 8312 prohibits payment of annuity to persons who have committed specified offenses involving the national security of the United States. Employing agencies are responsible for submitting all pertinent information to the Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health in any case when this law possibly applies.

FROM MERIT SYSTEMS PROTECTION BOARD
UNITED STATES OF AMERICA
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

APRIL 8, 1980

Wayne Lindahl
2685 Magee Avenue
San Pablo, CA 94806

Claim Number: CSA 2 115 707
Position: Police Officer

Your application for retirement under the disability provisions of the Civil Service Retirement Law has not been approved because total disability for useful and efficient service in the above position is not shown.

A careful review and evaluation by the Office of Personnel Management's medical staff of all evidence submitted in your case fails to establish that you have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position from which you are seeking retirement. Since the retirement law does not authorize benefits based on partial disability, your application cannot be approved at this time.

If you believe that the action taken on your application is not proper, you may request reconsideration of our finding within 30 calendar days after the date you receive this letter. Any request you make should show your name and address (including ZIP code), the claim number shown above and the reason for the request for reconsideration. You may submit with your request any additional evidence which you think might support your request. Address your request for reconsideration to the address indicated below.

By reason of your separation you are entitled to annuity beginning when you reach age 62. You may choose to receive an immediate refund of all of your retirement deductions instead of annuity benefits at age 62. If you desire the refund you should complete an Application for Refund of Retirement Deductions, Standard Form 2802, at least 31 days before your 62nd birthday.

Sincerely yours,

Retirement Claims
Retirement Operations Branch

Office of Personnel Management
Chief, Medical Operations Branch
Washington, D.C. 20415

Enclosure

FROM MERIT SYSTEMS PROTECTION BOARD

THE PERMANENTE MEDICAL GROUP
901 NEVIN AVENUE
RICHMOND, CALIFORNIA 94801 • (415)234-3131

DONALD P. FISCHER, M.D.
Physician-in-Chief

MAY 15, 1980

United States of America
Office of Personnel Management,
Chief, Medical Operations Branch,
Washington, D.C. 20415

Re: LINDAHL, Wayne
MR#: H-1598322
POSITION: Police Officer
SS#: 479 18 5184
CLAIM NUMBER: CSA 2 115 707

Dear Sir:

Your letter of April 8, 1980 informing Mr. Lindahl that his application for retirement under the disability provisions of the Civil Service Retirement Law had been disapproved was reviewed by the undersigned.

I will take this time to request a further evaluation of his claim, based on evidence that he does have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position of Police Officer at Mare Island Naval Shipyard.

Mr. Lindahl has been undergoing treatment for some time for a chronic and so far unremitting productive bronchitis. There is ample evidence to conclude that the many and ever-present pollutants, irritants and potential carcinogens in Mr. Lindahl's working life have played a part in causing his pulmonary disease. I consider that his disease causes symptoms of sufficient severity and persistence as to constitute a considerable deviation from what could reasonably be regarded as good health.

I have seen this patient on innumerable occasions with his acute bronchitis, and there is no doubt whatsoever in my mind that each of these attacks, (and many for which he

has not seen me) are in fact attacks of severe bronchitis. He has frequent uncontrollable coughs, in my opinion undoubtedly caused by pollutants in the air which he breathes. Some of the pains he complains of are, I am sure, due to attacks of acute tracheo bronchitis. He also has some psychological component in his suffering.

It is my opinion that he cannot safely and effectively work in any area that subjects him to pollutants or other irritants. It continues to be my opinion that because of the ubiquitous nature of these pollutants in the work atmosphere, he is incapable of working at Mare Island Naval Shipyard.

If I can be of any further help in processing Mr. Lindahl's claim for retirement, please do not hesitate to contact me.

Sincerely,

/s/ Beverly C. Allan
BEVERLY C. ALLAN, M.D.,
Department of Internal Medicine.

BCA:pb
cc: Wayne Lindahl
File

FROM MERIT SYSTEMS PROTECTION BOARD
UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

CSA 2 115 707

Wayne Lindahl
2685 Magee Avenue
San Pablo, California 94806

Reconsideration request of Wayne Lindhal
5USC 8331(6).8337

Federal Personnel Manual Supplement 831-1, Subchapter S10 sets out the conditions that must be met by an employee in order to be eligible for an immediate annuity because of disability retirement. One of these conditions is that an employee must, while employed subject to the retirement system, have become totally disabled for useful and efficient service in his or her position. To make this determination, the claim is reviewed with attention to the following considerations:

1. Documentation of a deficiency in service with respect to performance, conduct or attendance.
2. Documentation of a medical condition—disease or injury.
3. A relationship between the service deficiency and the medical condition such that the medical condition has caused the service deficiency.
4. The expected duration of the medical condition.
5. The incompatibility of the medical condition with either useful service in or retention in the position.

A determination of total disability is made when the information in the file indicates that there is a service deficiency of sufficient degree, caused by disease or injury which would preclude useful and efficient service by the employee.

The records show that your disability retirement application was signed on October 9, 1979. The objective medical evidence submitted in your case failed to establish that you were totally disabled within the meaning and intent of the civil service retirement regulations and thereupon the claim

was disallowed. On March 21, 1980, you were sent notification that your claim was denied. You requested reconsideration of this action by letter dated May 15, 1980, which was accepted to initiate a review of your claim.

The requirements of the last position occupied, that of Police Officer was noted. We have evaluated all of the information that was presented. The data includes:

1. Letter—Beverly C. Allan, M.D.—May 15, 1980
2. Report—Superior Officer—May 18, 1980
3. Letter—Ray C. Nieman—May 27, 1980

In your application, we gave reasons for requesting a disability retirement annuity as follows:

1. Acute pulmonary problems
2. chronic Bronchitis
3. severe cough
4. chills
5. fever
6. total exhaustion
7. tire very easily
8. lung pains
9. heart attack
10. cannot recuperate strength
11. off work frequently
12. sweating
13. sensitive to hot and cold temperature changes
14. physical exhaustion

Your supervisor cites that according to the physician, you were not allowed to climb stairs, walk excessively, stand for extended time, come in contact with fumes or cigarette smoke.

You have many subjective symptoms but very few objective findings to uphold the symptomatology. Part of your disability at this time is due to poor conditioning since you are overweight and indulge in very little physical activity according to Dr. Frederick Epstein. Pulmonary function tests are normal.

While your condition is admittedly bothersome, there are no clinical findings which document a physical impairment

incompatible with retention in your position or the fulfillment of your assigned duties.

We recognize that there may be discomforts and annoyances present; however, we lack objective medical findings to support a sustained condition of total disablement for your position held. There are no provisions in the disability retirement regulations for annuity payments for partial disability.

An analysis of all the facts and the total medical evidence in the file leads us to a conclusion that additional medical examinations are not indicated and allowance of your claim is not warranted.

Should you wish to initiate an appeal of this decision, mail it directly to:

Regional Administrator, Merit System
Protection Board
525 Market Street
24th Floor
San Francisco, California 94105

Along with the letter of appeal you should submit any further medical or other evidence to substantiate your claim.

We regret that the facts of the case do not allow us to give you a more favorable determination.

Sincerely yours,

GEORGE M. SMITH, M.D.
Medical Director

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO FIELD OFFICE

WAYNE LINDAHL

v.

OFFICE OF PERSONNEL MANAGEMENT

Decision Number: SF831L8110492
Date: May 8, 1981

INTRODUCTION

By petition filed January 9, 1981, appellant Wayne Lindahl appealed a December 9, 1980, reconsideration decision from the Office of Personnel Management (OPM) which disallowed his application for disability retirement dated October 9, 1979. Appeal File, AF, Tabs 1, 4, and 11.

JURISDICTION

Since the appellant's application for disability retirement was initiated after January 11, 1979, the effective date of the Civil Service Reform Act of 1978, this appeal is covered by that Act. Pub. L. No. 95-454, 92 Stat. 1111 (1978), (Codified in scattered sections of 5 U.S.C.).

A right of appeal from a reconsideration decision by OPM is granted by 5 U.S.C. 8347(d), which states,"An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board." This right of appeal is confirmed by OPM's own regulations, which state that an appeal to this Board may be made after receipt of the reconsideration decision. 5 C.F.R. 831.1205 (45 Fed. Reg. 23633, April 8, 1980).

Accordingly, this appeal is within the jurisdiction of this Board.

ANALYSIS AND FINDINGS

The evidence upon which this decision is based was obtained from written submissions of both parties and testi-

mony presented at a hearing held in San Francisco, California. OPM was advised of the date, time, and location by notice dated February 27, 1981. AF, Tab 28.

The basic statutory entitlement to a disability retirement is set forth in 5 U.S.C. 8337(a) as follows: "An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency."

The term "disabled" is defined as "totally disabled . . . for useful and efficient service in the grade or class of position last occupied by the employee or Member because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled." 5 U.S.C. 8331(6).

At the time of his application, appellant had completed in excess of five (5) years of Federal civilian service covered by the Civil Service Retirement System.

OPM has made no finding or allegation that "vicious habits, intemperance or willful misconduct" played any role in appellant's condition, and this grounds for exclusion under 5 U.S.C. 8331(6) is given no consideration.

The sole substantive issue, therefore, is whether appellant was disabled within the meaning of 5 U.S.C. 8331(6).

Before addressing that issue, however, it is necessary to consider the matter of the degree of proof and which party has the burden of proof to establish the disability.

The cited Civil Service Reform Act (Reform Act) and the Board's regulations provide that in appeals before the Board, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence, 5 U.S.C. 7701(c)(1)(B) (1980), and 5 C.F.R. 1201.56(a)(iii)(1980), except in cases brought under 5 U.S.C. 4303, which covers actions based on unacceptable performance. 5 U.S.C. 7701(c)(1)(1980).

If these provisions were applied to an appeal such as the instant one, OPM would be required to establish, by a preponderance of the evidence, that appellant was *not* entitled to the disability retirement claimed.

However, the legislative history indicates that in enacting the burden of proof provision, Congress was concerned only with the Board's review of adverse actions concerning misconduct or unacceptable performance. There was no reference to disability retirement appeals. H.R. Rep. No. 95-1717, 95th Cong. 2nd Sess., 138-139 (1978), *reprinted in* Committee on Post Office and Civil Service, H.R. 96th Cong. 1st Ses., Vol. II, LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1980-1981 (1979).

Furthermore, there is no indication that the cited Board regulation on burden of proof was intended to do anything more than implement the provision of the statute.

The general rule of law requires the party asserting the existence of disputed facts to carry the burden of proof regarding those facts. That is, he or she must persuade the trier of fact that they are true. *Williams* v. *Administrator of National Aeronautics and Space Administration*, 463 F.2d 1391, 1400 (C.C.P.A. 1972); *Marcum* v. *U.S.*, 452 F.2d 36, 39 (5th Cir.1971). In this appeal, the appellant has made a claim of disability, OPM has adjudicated that claim, and the appellant has appealed to this Board. If the burden of proof were placed on OPM, the mere presentation of a claim, without supporting evidence, would require OPM to undertake the burden of disproving the claim. Aside from being contrary to the general rule of law, cited above, this result would run counter to the well settled principle that the party with the best knowledge of the facts, absent other considerations, should bear the burden of proof as to those facts. *Bratton Corp.* v. *OSHRC*, 590 F.2d 273 (8th Cir. 1979); *Old Ben Coal Corp.* v. *Interior Bd. of Mine Op. App.*, 523 F.2d 25, 36, (7th Cir. 1975); cf., *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935).

In voluntary disability retirement cases, the appellant is significantly more likely than OPM to be aware of his or her health and its effect on job performance. Moreover, in similar cases where applicants seek disability benefits under the Social Security Act, the court has held, "the appellant has the burden of establishing entitlement to disability benefits under the Social Security Act." *Billings* v. *United*

States, 334 F. Supp. 1392 (D. Nebraska 1971). Also, in *Turner* v. *Califano*, 563 F.2d 669, 670 (5th Cir.1977), the court held, "the burden of proof in Social Security cases rests upon the claimant." Similarly, the burden of proof rests with the applicant for unemployment compensation, *Department of Industrial Relations* v. *Tomlinson*, 36 So.2d 496 (Ala. App. 1948); for black lung benefits under the Federal Coal Mine Health & Safety Act, *Brock* v. *Weinberger*, 405 F. Supp. 1329 (D. Ct. Ark. 1975); and for worker's compensation benefits under the Longshoremen's Compensation Act, *Eschach* v. *Contractors, Pacific Naval Air Base*, 181 F.2d 860 (7th Cir. 1950).

Therefore, I conclude that the burden is on the appellant in this case to prove that he is entitled to the disability retirement payments which he seeks.

With reference to the standard or degree of proof which the appellant must meet, 5 U.S.C. 7701(c)(1)(B), as noted earlier, requires a preponderance of the evidence standard. The preponderance standard requires a showing of evidence "that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue...." *William Parker* v. *Defense Logistics Agency*, MSPB Order Docket No. PH053199001 p. 29 (Feb. 19, 1980). In addition, the preponderance standard is the usual evidentiary standard in administrative proceedings. B. Menzines, J. Stein, J. Gruff, *Administrative Law*, 24-29 (1980).

In summary, appellant must prove his disability by a preponderance.

In its reconsideration decision of Devember 4, 1980, OPM briefly addressed appellant's application, the stated reasons given for the application, appellant's position description as a Police Officer with the Naval Support Activity, Mare Island, Vallejo, California, and the medical evidence. OPM's Medical Director, Dr. George M. Smith, M.D., concluded that appellant had "many subjective symptoms, but very few objective findings to uphold the symptomatology." Dr. Smith noted that appellant's "pulmonary function tests were normal" in concluding that total disability, as required, had not been shown. AF, Tab 4.

Regarding the type of evidence which may be considered in determining disability, I will address the following four categories: (1) the appellant's subjective complaints and evidence of related objective manifestations; (2) appellant's work history, including supervisory observations; (3) objective medical evidence; and (4) expert medical opinions. The weight to be given each of these categories is dependent upon the usual considerations inherent in the weighing of evidence in any individual case (e.g., reliability, relevance). There is no requirement in the relevant statutes, regulations, or rules that *only* a single type of evidence of a certain character, for example, "objective medical evidence" must be considered.

Concerning evidence of the type in category (1), above, appellant's application disclosed the following description of his disabilities:

> Accumulative, acute pulmanary (sic), chronic bronchitis—severe cough, chills, fever, total exhaustion, sweating, sensitive to hot-cold temperature changes physical exhaustion—tire very early—lung pains heart attack—cannot recooperate (sic) strength. Off work—Frequent Doctor's visits and medicine all the time congestion" (Original punctuation).

The stated date of total disability given by appellant was October 26, 1976. AF, Tab 11.

Appellant did not augment these contentions by testimony. The record, however, contains a previous application for disability retirement, dated April 3, 1978, in which appellant cited the following disabilities: "Shortness of breath, pains in my chest, coughing, sneezing, frequent fever and chills. Infection in my lungs. Bronchitis, hypertention." AF, Tab 24.

Regarding work history, category (2), above, no direct evidence of the total amount of lost time due to illness was provided. The substance of their testimony was that appellant's personal physician Beverly Allen, M.D., had provided reports that concluded that appellant should not be assigned overtime, and he was also precluded from performing the full range of his duties due to his bronchial condition which was exacerbated by exhaust fumes, dust from

sand blasting and smoke from cigarettes. Hearing Transcript, HT, pp. 39-43, 52-55.

One of appellant's supervisor's, R.C. Nieman, Security Officer, testified that appellant had a "very poor attendance record" and had frequent sick leave. HT, p. 70. Another, L.I. Hodges, Chief of Police, noted that appellant frequently complained about irritants. However, Mr. Hodges pointed out that he never observed symptoms of irritation, but only heard appellant's complaints, for example, about smoke in the "squad room". HT, pp 57-58. The record did contain the note in the Superior Officer's Statement portion of the application that "when around persons smoking, (appellant) appeared to start coughing." AF, Tab 8.

Taken as a whole, however, the record discloses a definite lack of evidence of observed symptoms of irritation such as coughing, sneezing, breathing difficulties, watering eyes, etc. or other observable manifestations of appellant's claimed ailments by co-workers and supervisors. I consider this lack of evidence to be of some weight when viewed in the light of medical reports described, below, since these persons were regularly with appellant during duty hours, and no reason has been established or even advanced to discount the statement of Mr. Hodges or to explain this want of objective corroboration.

Before turning to the categories (3) and (4), above, objective medical findings and medical opinion, I note that appellant has referred to his separation from his position by the Naval Support Activity, on October 5, 1980. The record reveals that his separation was proposed and effected for the reason that his "physical condition (had) disabled (him) to such an extent that (he was) unable to perform the full range of duties required....". AF, Tabs 7 and 9; Hearing Exhibit, HE, 1. Appellant's supervisors testified that this decision to separate appellant was based on reports of Dr. Allen which concluded that he could only perform limited not the full range of his duties because of his stated bronchial condition.

It should be noted, therefore, that appellant's supervisors did not conclude appellant could not do his duties because of their own personal observations. Rather their con-

clusions were based on physicians reports. HT pp. 40, 55-56, 69-70. A Superior Officer's Statement, a part of the disability application noted, "*According to his physician*, he was not allowed to climb stairs walk excessively, stand for an extended period of time, come in contact with fumes or cigarette smoke". AF, Tab 8. (Emphasis added).

The Board has repeatedly made clear that a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled under 5 U.S.C. 8331(6) so as to be eligible for a disability annuity under 5 U.S.C. 8337 from OPM. *Page* v. *OPM*, MSPB Order No. SF831L09015 (12/8/80); *Cullerton* v. *OPM*, MSPB Order No. CH831L8010088 (3/17/81); *Boyd* v. *OPM*, MSPB Order No. SL831L8010056 (3/17/81); *Basinger* v. *OPM*, MSPB Docket No. DC831L09014 (3/17/81), citing *Polos* v. *United States*, 621 F.2d 385, 393 (Ct. Cl. 1980), and *Piccone* v. *United States*, 407 F.2d 866, 872 (Ct. Cl. 1969).

The record contains several medical opinions and reports of medical findings. Those completely supportive of appellant's claim were provided by his physician Dr. Allen. Dr. Allen's most recent report of record was dated May 15, 1980. Dr. Allen stated that she had been appellant on "innumerable occasions with his acute bronchitis" and there was "no doubt whatsoever in (her) mind that each of these attacks ... are (sic) in fact attacks of severe bronchitis". She concluded, "He has frequent uncontrollable coughs, in my opinion undoubtedly caused by pollutants in the air which he breathes.... He also has some psychological component in his suffering." She concluded that he was not capable of working at his position due to his condition, and the "ubiquitous nature" of pollutants in the work atmosphere. AF, Tab 6.

Dr. Allen's statement of September 25, 1979, submitted with the application at issue, provided a diagnosis of "chronic bronchitis," and concluded that appellant was permanently disabled. Under physical findings, Dr. Allen noted that appellant's "treadmill and cardiac x-rays were normal". AF, Tab 22.

Enclosed with her report were copies of records of appellant's hospitalization in January 1979. The Discharge Summary prepared by Dr. Allen showed "Physical Examination: Patient ... has little to find". "Laboratory Data" identified no positive test or laboratory findings relative to bronchitis. AF, Tab 20. In a letter to the employing agency, dated June 20, 1979, Dr. Allen noted appellant had recurrent attacks of disabling bronchitis and her opinion that he was incapable of working. AF, Tab 21.

I have also considered Dr. Allen's earlier submitted reports including those transmitted with a previous application for disability retirement to OPM submitted on April 3, 1978. AF, Tab 24. This was denied by OPM on October 17, 1978. AF, Tab 23. This application was based on the claimed bronchitis.

Dr. Allen's report of physical findings noted recurrent episodes of bronchitis. Chest x-ray was "unremarkable except for slight tortuosity of the aorta." Pulmonary function studies were noted without conclusion as to abnormality or evidence of disability. AF, Tab 17. She concluded that appellant was disabled. Appellant's respiration rate was described as "normal".

A report dated February 13, 1978, by John Williams, M.D., of the employing agency's Medical Department stated physical findings and noted appellant "coughing (hacking) throughout the examination," Other findings were negative. Regarding "CHEST: Ausculation of the heart shows a regular rhythm with no murmurs. (word omitted—Lungs?) are clear." Dr. Williams' concluded, "Employee is probably disabled for his position and for any work requiring exposure to significant levels of stress or to respiratory irritants." AF, Tab 26.

Other letters of Dr. Allen dated August 17, 1978, and October 25, and September 9, 1977, are a matter of record. These refer to the condition of bronchitis, said to result from pollutants at the work location, and do not describe tests or other laboratory indicia of the condition. AF, Tabs 19, 16, and 15.

OPM referred appellant to a physician, Frederick Epstein, M.D., who twice examined appellant in February

1980, and provided a report detailing the results of tests performed, as well as providing an opinion. AF, Tab 13.

Regarding environmentally induced bronchitis, Dr. Epstein noted the following:

> He has been told by his Kaiser physician that he has an environmentally induced chronic bronchitis. However, since he has been off work, his symptoms have been no better. He states that he coughs and sneezes a lot. He has been referred for allergy testing at Kaiser, and these studies were essentially negative except for a mild reaction to corn. He continues to feel fatigue all the time. He has recently been on antibiotics fairly continuously, alternating Ampicillin and Tetracycline. He has sustained no weight loss.

Regarding chest and lungs, Dr. Epstein noted:

> Examination of the chest reveals it to be well muscled. Expansion is equal bilaterally, and the diaphragms seem to move well. His lungs are clear to percussion and auscultation. There is no wheezing heard even on forced expiration.
>
> Chest x-rays were done in inspiration and expiration in the PA view and in the lateral projection. These studies showed the lung parenchyma to be essentially clear. The diaphragms moved well. The heart was not enlarged. However, there was some pleural thickening along the lateral chest walls, bilaterally, which I believe is consistent with but not diagnostic of early asbestosis.
>
> DISCUSSION: From the historical point of view, this patient has had repeated and prolonged respiratory symptoms, since at least 1974. This would appear to be related to a variety of environmental irritants to which he has been exposed, including asbestos.
>
> From an objective standpoint, as the result of my examination and review of his films and pulmonary function tests, it would seem to me that *his subjective symtoms are somewhat out of proportion to the objective findings*, especially in a patient who has never smoked. His ventilation studies reveal a total vital capacity of 5100, which is normal. His FEV_1 is 4200 and the ration of FEV_1 to FVC is 87%, also well within normal limits. We can therefore, I believe, say that *there is no evidence of either restrictive or obstructive*

disease at this time, which would seem to indicate to me that he has little if any interstitial disease from asbestos exposure.

In would seem to me that the most likely classification for his disability would be a *chronic type of sensitivity bronchitis superimposed on a basically anxious personality type*. So far as I can determine, he has never been tried on corticosteroid therapy. As noted, I believe the possibility of minimal pleural asbestosis is very real.

Part of his disability at this time, I believe, is due to poor conditioning, since he is overweight and indulges in very little physical activity. (Emphasis added.)

I have also considered the medical findings of Gerald Levine, M.D., as stated in his report of April 10, 1978. I have considered his findings since they are pertinent to the claimed disabilities, are not significantly removed in time, and they provide objective data on matters addressed by Dr. Allen in her noted reports of 1977 and 1978. AF, Tab 27.

Regarding the relevant condition Dr. Levine noted the following:

PHYSICAL EXAMINATION: He was a dour, large white male with a frequent dry cough during the course of the interview. His blood pressure was 120/90 in the left arm sitting. His heart rate was 72 and regular. Respirations were 12 and unlabored. *Head and Neck*: The fundi were normal. The pupils were equal and reacted to light. There was no jaundice, pallor, cyanosis, cervical adenopathy, or thyromegaly. His throat was erythematous. The jugular venous pressure was not elevated. He was not using his accessory muscles of respiration. *Chest:* The lateral expansion was four inches. Percussion was resonant. The breath sounds were vesicular. There were no adventitious sounds. *Cardiac:* There was no cardiomegaly, murmurs, or gallops. *Abdomen*: There was no hepatosplenomegaly. *Extremities:* There was no clubbing, edema, or calf tenderness. The pedal pulses were present but diminished. *Nuerological*: Physiologically intact.

LABORATORY DATA: The laboratory data included a normal CBC with a hemoglobin of 17.7 gms.% and a hemoglobin of 49.8% with normal red blood cell indices. The white count was 6,000 with a normal differential. A urinalysis was normal. Serum electrolytes, glucose, and BUN were normal as was the remainder of the SMA 12 although the triglycerides nonfasting were minimally elevated to 156. A chest x-ray was interpreted as follows: "Parenchyma is clear. There is minimal diffuse bilateral pleural thickening. Heart is not enlarged. There is a tortuous ascending aorta reflecting perhaps hypertension. There is some elevation of the left diaphragm. No acute disease is identified." An electrocardiogram was within normal limits.

A pulmonary function study included normal static lung volumes with a vital capacity of 4.75 litres which (was) 95% of normal, a residual volume of 102%, a total lung capacity of 97%, and a functional residual capacity of 85%. The mechanics of breathing revealed mild airways obstruction with no significant post-bronchodilator response. The forced vital capacity rose from 5.24 litres before to 5.33 litres after bronchodilator. The forced expiratory volume in one second from 3.14 litres before to 3.01 litres after bronchodilator, and the forced expiratory volume in one second percent, the normal value being greater than 70%, was 60% before and 56% after bronchodilator. The maximal expiratory flow rate was 247 litres per minute before and 239 litres per minute after bronchodilator, the normal range being 432 ± 108 litres per minute. The maximal mid-expiratory flow rate was 2.64 litres per second before and 2.49 litres per second after bronchodilator, the normal range being 3.6 ± 1.1 litres per second. These reveal mild airways obstruction. The helium mixing time was normal excluding maldistribution of inspired air. The diffusion capacity was normal excluding emphysema or interstitial lung disease.

. . .

In my evaluation I had the distinct impression that this man was profoundly depressed. *The physical examination for all intents and purposes was within normal limits.* The *laboratory testing confirmed this evidencing only some mild airways obstruction which*

could not conceivably account for the degree of symptoms the patient has described. I do not doubt that he may have recurrent upper respiratory infections, but there does not seem to be any significant underlying immunologic disorder to account for this. *I do not feel he has any disability relating to his physical conditioning. He certainly does not have any pulmonary physiological disability.* Attention paid to his depressive reaction may be rehabilitative. (Emphasis added.)

Reviewing the record evidence, I note that Dr. Allen has provided conclusions of disability based on her clinical observations of appellant. She described appellant's "uncontrollable coughs". In view of these conclusions it is significant that no such occurrences in the work place were reported by appellant, his co-workers, or supervisors. Reports of physical findings, tests, or other objectively verifiable medical evidence were not provided to support her observations. If it was the case that no such evidence is ever available in such a case, then a competent medical finding stating that conclusion was required but not provided.

Based on Dr. Epstein's report, it is apparent that such tests and other objective indicia of the disabling bronchial condition are susceptible of ascertainment. Dr. Epstein reviewed test and physical findings and noted "no evidence of either restrictive or obstructive disease" and that appellant's subjective symptoms were disproportionate to cited objective findings.

In light of the lack of evidence of observed symptoms by others and Dr. Epstein's conclusion supported as they were by the cited findings, I conclude that his conclusions are entitled to more weight than Dr. Allen's. In reaching this conclusion I am not unmindful of the length of time of patient relationship between Dr. Allen and appellant. I have also considered that Dr. Smith's opinion, although not based on a physical examination, was entitled to some weight since it was based on a professed review of the record assembled to that time.

I have not entirely discounted Dr. Williams' opinion of appellant's condition in early 1978 regarding the chronic bronchitis, but conclude that the tentative character of his conclusion, "probably disabled," in the absence of cited pos-

itive, objective physical findings, diminishes the weight to be ascribed to it. Furthermore, Dr. Levine's conclusion based on his review of tests and stated data are consonant with those of Dr. Epstein, and provide persuasive rebuttal to Dr. Williams.

Having heard, read and considered the record evidence, I find that appellant has not established by a preponderance of the evidence that he has a disease or injury which renders him totally disabled for useful and efficient service in his last occupied position. Accordingly, I conclude that he is not entitled to disability retirement pursuant to 5 U.S.C. 8337.

DECISION

The December 4, 1980, decision of the Office of Personnel Management which denied appellant's application is hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 12, 1981 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Under 5 USC 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

/s/ Philip L. Arnaudo

PHILIP L. ARNAUDO
Presiding Official

IN THE UNITED STATES COURT OF CLAIMS

Ct. Cls. No. Appeal 39-81
WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

PETITION FOR REVIEW FILED JUNE 10, 1981 TO THE UNITED STATES COURT OF CLAIMS:

The Plaintiff respectfully alleges as follows:

STATEMENT OF FACTS

1. WAYNE LINDAHL (hereinafter referred to as 'Lindahl') is a citizen of the United States, currently a civilian, residing at 2685 Magee Avenue, San Pablo, California, 94806.

2. On January 25, 1968 Lindahl commenced working for the United States government as a career-conditional appointee, at Mare Island Naval Shipyard, Vallejo, California.

3. On June 21, 1970 Lindahl was promoted to the Naval Support Activity as a guard (GS-5).

4. On January 25, 1971 Lindahl was converted to career tenure.

5. In June, 1976, Lindahl began to have recurrent episodes of acute and chronic bronchitis.

6. On February 21, 1978 Lindahl applied for total disability retirement due to chronic bronchitis. It was denied by the U.S. Civil Service Commission on October 17, 1978.

7. On September 4, 1979 Lindahl was notified of an intent to separate him from his duties as a security officer due to the fact that his physical condition disabled him to such an extent that he was unable to perform the full range of duties as a security officer.

8. On September 5, 1979 Lindahl filed an application for employee disability retirement due to the pulmonary condition.

9. On October 5, 1979 Lindahl was separated from the Naval Support Activity, Mare Island, Vallejo, California

while his application for disability retirement was being processed.

10. On April 8, 1980 the application for disability retirement was denied. A request for reconsideration was denied on December 4, 1980.

11. On March 20, 1981 a hearing was held before the Merit Systems Protection Board, San Francisco, California. Four witnesses, Lee Lofton, Lawrence Hodges, Roy C. Nieman, and John Szalon all testified that Lindahl was not able to carry out his duties due to a severe case of bronchitis.

12. Other evidence considered included statements of Lindahl about his condition and medical reports of Beverly Allen, M.D., John Williams, F. Epstein, Gerald Levine, M.D. The latter two were hearsay documents based on short cursory examinations, and the two witnesses were not subject to cross-examination.

13. On May 8, 1981 the Merit Systems Protection Board denied Lindahl's appeal. They placed the burden of proving that the decision of the Department of the Navy was not supported by a preponderance of the evidence upon Lindahl. This is in clear violation of 5 United States Code, Section 7701(c)(1)(B) and 5 C.F.R. Section 1201.56(a) and caused specific harm to Lindahl.

Also the decision was based on the hearsay reports of Dr. Levine and Dr. Epstein. Lindahl received notification of the decision on May 11, 1981.

ALLEGATIONS SUPPORTING RELIEF

14. The decision of the Merit Systems Protection Board was invalid because it misconstrued specific Congressional Legislation regarding the burden of proof.

15. The hearing conducted by the Merit Systems Protection Board resulted in substantial error going to the very heart of the administrative hearing because it considered illegal evidence, namely the written reports of Dr. Epstein and Dr. Levine, ignored all of the other substantial evidence showing the disability of Lindahl, and denied the right to cross-examination of government witnesses.

16. The action of the Department of the Navy violated procedural due process in violation of its own regulations and that of the United States Executive Department regarding termination of Lindahl.

CITATION OF STATUTES REGULATIONS, AND ORDERS

17. 28USC 1491, which empowers this court to render judgement upon a claim against the United States founded upon the Constitution, Acts of Congress or Regulations of the Executive Department for damges.

18. 5USC 7703 and 5USC 8347 which empowers the Court of Claims to review final decisions of the Merit Systems Protection Board.

19. 5USC 7701 and 5CFR 1201.56 which sets the standard for burden of proof in cases before the Merit Systems Protection Board.

20. 5USC 8337, which provides the criteria for disability retirement.

21. Federal Personal Manual Sections and Naval Regulations which state the procedure for processing terminations and applications for disability retirement.

DEMAND FOR JUDGEMENT

22. In that Lindahl was wrongly denied his retirement disability, by denial of procedural rights, misconstruction of legislation, and errors going to the heart of the administrative determination, Lindahl requests that judgement be entered in his favor for any amounts due him pusuant to Rule 131 of the Rules of Court and that he be declared eligible for disability retirement.

/s/ John Murcko

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Dated: June 8, 1981

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

DECIDED: September 22, 1983

Before the court In Banc.
MARKEY, *Chief Judge.*

Petitioner Lindahl appeals from a decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of his request for a disability annuity. We order dismissal of the appeal for lack of jurisdiction.

BACKGROUND

On September 5, 1978, Lindahl elected to retire, on the basis of disability, from his civilian employment with the United States Navy. On September 25, 1979, the Navy notified him that he would be separated for physical disability. He accepted the disability separation but claimed an annuity. On March 21, 1980, OPM's denial of the annuity was affirmed in a comprehensive opinion, No. SF 831L8110492, in which MSPB pointed out that the degree of disability required for voluntary separation is less than that required for entitlement to an annuity, and that Lindahl was not disabled to the extent required for an annuity. Lindahl filed an appeal in the Court of Claims, on June 10, 1981, and the case was transferred to this court on 1 October 1982 in accord with the Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164, 96 Stat. 25.

The government moved to dismiss, citing as alternate grounds: (1) judicial review is precluded by 5 U.S.C.

§ 8347(c); (2) jurisdiction is lacking under 5 U.S.C. § 7703 because Lindahl is not an "employee". Because we dismiss on (1), we need not and do not in this case determine the meaning or scope of the word "employee" in § 7703.

OPINION

Judicial Review is Precluded by 5 U.S.C. § 8347(c)

Congress established a retirement system for federal employees. 5 U.S.C. § 8337. The right to retirement per se, or to a retirement annuity is not founded in the Constitution. The rights created having their genesis in a statute, Congress was at liberty, *Dismuke* v. *United States*, 297 U.S. 167, 172 (1936), to establish a statutory scheme in which the decisions governing eligibility for disability retirement and annuities would be made entirely within the administrative process. Congress was further at liberty to amend that scheme to provide a review step within the administrative process, and to provide for judicial review of one type of such decisions.

Congress did precisely that, the amended statutory scheme being set forth in the current statute at 5 U.S.C. § 8347(c) and (d):

> (c) The Office [OPM] shall determine questions of disability and dependency arising under this subchapter. *Except to the extent provided under subsection (d) of this section*, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d) (1) *Subject to paragraph (2) of this subsection*, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) *In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was*

made pursuant to an application by an agency for purposes of disability retirement under section 8377(d) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

The emphasized matter is that added in 1980 by Pub. L. No. 96-500, 94 Stat. 2696.

The parties' briefs and arguments do not note that the OPM decision in this case was rendered before the January 1, 1981 effective date of the 1980 amendment. When the OPM decision was rendered, sections 8347(c) and (d) were as above quoted, but without the emphasized matter. We are required, absent manifest injustice, to apply the law as it exists at the time of our deicison. *Bell* v. *New Jersey and Pennsylvania*, 103 S. Ct. 2187, 2199 (1933) (White, J., concurring). In the present case, no such manifest injustice would result, which may account for the parties' discussion of the statute as it was amended in 1980.

We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a voluntary physical disability retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1). In such cases, the initial decision is that of the employee who has elected to retire, and who has asserted disability as the reason, and who as then sought an annuity.

Lindahl here seeks judicial review of MSPB's decision on the "question" of his disability as entitling him to an annuity. The so-called "finality clause" in § 8347(c) states unequivocally and unambiguously that administrative decisions on questions of disability "are final and conclusive and are not subject to review". It is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence.

The finality clause first appeared, in relation to survivorship benefits, in 5 U.S.C. § 724, in 1948. No legislative history existed in relation to that section, and none is needed in view of its continued unambiguous nature. In 1956, as

codified at 5 U.S.C. § 2266(c), the preclusion of review was extended to include disability cases.

Subsequent legislative enactments and court decisions dealing with federal employee retirement, as well as those dealing with other rights of federal employees, have resulted in substantial confusion respecting the limited question before us.

Respecting retirement, Congress passed in 1978 an amendment to § 8347, Pub. L. No. 95-454, 92 Stat. 1111, providing for review by MSPB of OPM disability decisions. § 8347(d). By that amendment, Congress continued to limit the enforcement of voluntary disability retirement rights to the administrative process. It nonetheless provided, to an individual dissatisfied with an OPM decision, an appeal to a quasi-judicial tribunal independent of OPM and affording appropriate administrative review procedures.

In the 1978 amendment Congress let stand the provision in § 8347(b) that OPM "shall adjudicate all claims under this chapter". Congress did not specifically spell out in the statute that § 8347(d) was an exception to the finality clause in § 8347(c).

The history of what Congress did, up to and including its adoption of the 1980 amendment indicates its present intent to deny judicial review of MSPB decisions on questions of disability, other than those involved when an agency forces retirement for mental disability. By the language it selected in constructing § 8347, Congress began with a total limitation to the administrative process, topping the process with the decision by the Civil Service Commission (now OPM). In 1978, Congress provided for review of OPM decision, still within the administrative process, by MSPB. In reenacting § 8347(c) without change, Congress thus provided that the review process of § 8347(d) ended at the MSPB level. Until 1980, Congress had at no time specifically granted jurisdiction to any court to review any decision, by either OPM or MSPB, on questions of disability and dependency. Then, in 1980, for the first time, Congress provided for judicial review, but only to individuals forced to retire at the instance of an agency on the basis of the individual's alleged mental condition. In that 1980 amend-

ment, Congress clarified the relationship between § 8347(c) and (d) by inserting in the former "Except to the extent provided under subsection (d)".

Thus, the plain language of the statute, with which we must begin, *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979), expressly precludes review beyond the administrative process, i.e., it precludes judicial review, of denials of voluntary disability retirement annuity claims such as Lindahl's. An express statutory provision that certain decisions of an administrative agency "are final and conclusive and are not subject to review" should not be interpreted as though it said such decisions "are *not* final and are *not* conclusive and *are* subject to *some judicial* review". Certainly that interpretation should not be adopted after Congress has in the same statute provided that *other* decisions are subject to review. To so read the review-precluding language of the present statute would appear not a judicial act of interpretation but a legislative act of repeal.

Whatever may be said of the finality clause in the abstract, the subsequent actions of the Congress providing specific and particular exceptions to that clause, one administrative, the other judicial, provide compelling evidence of its intent to preclude judicial review of MSPB decisions on voluntary disability retirement claims. Congress having provided for administrative review in §8347(d)(1), the express exclusion of review in § 8347(c) can relate only to judicial review.

Where, as here, Congress has repeatedly revisited the statute, and where, as here, those self-reviews of its earlier handiwork included two in which it has spelled out specific exceptions to its total preclusion of review, and the specific forums for each, it is not within the province of a court to create additional exceptions. Congress has addressed the question of exceptions, has in the 1980 amendment created legislation without ambiguity or inconsistency, has assured uniformity in the retirement law by making certain discrete disability claims decidable exclusively by MSPB and others exclusively reviewable in this court, has dealt with all classes of disability annuity claimants, and has provided

specific means through which each class may pursue claims for annuity. No basis exists on which this court could exercise an assumed power to create some new class of annuity claimants or to design some new procedure that would include a right of such claimants to appeal to this court.

Lindahl is not within the class of claimants to which the right to judicial review of MSPB disability decision is provided by § 8347(d)(2). He cites no constitutional infirmity in the legislation governing disability retirement or in the classifications made in that legislation.

This court's grant of jurisdiction to review MSPB decision is broad but not unlimited. Among the limitations on that grant is necessarily a statute expressly excluding review of certain decision. Such a statute is spelled out in 5 U.S.C. § 8347(c) and (d). The government's motion to dismiss must therefore be granted.[1]

ASSERTED BASES FOR JURISDICTION

As above indicated, legislation creating rights of federal employees, and the legislative history of that legislation, have clouded the search for clarity that is an integral part of the judicial process. Equally well intentioned and careful courts have reached differing conclusions respecting what the intent of Congress was when it enacted and amended § 8347. Intent of Congress being the touchstone in cases of statutory interpretation, we have been cited to a number of bases upon which it might be held that Congress intended this court to exercise a jurisdiction to review MSPB decisions on voluntary disability retirement annuity claims.

(a) *The Scroggins Line of Cases*

In *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968), it was said that the

[1] Lindahl suggests that 28 U.S.C. § 1491 may supply jurisdiction in the Claims Court to determine the question of whether his disability entitles him to an annuity following his voluntary disability retirement, the claim having been denied by OPM and by MSPB after review under § 8347(d)(1). Jurisdiction of the Claims Court being a matter for its decision in the first instance, we need not and do not here respond to Lindahl's suggestion.

finality clause of § 8347(c) meant that "at best, a court can set aside the Commissioner's determination only 'when there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination' ".

Though the "procedural departure, legislation misconstruction, or like error" quotation was from *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied* 371 U.S. 936 (1962), it has been labeled the"Scroggins formula", and referred to in: *Polos* v. *United States*, 621 F.2d 385, 391-92 (Ct. C1. 1980); *Fancher* v. *United States*, 588 F.2d 803, 806 (Ct. C1. 1978); *Allen* v. *United States*, 571 F.2d 14, 17 (Ct. C1. 1978); *McFarland* v. *United States*, 517 F.2d 938, 942-43 (Ct. C1. 1975), *cert. denied*, 423 U.S. 1049 (1976); *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct. C1. 1968).

The "Scroggins formula", though quoted from *Gaines* in *Scroggins*, had its genesis in *Smith* v. *Dulles*, 236 F.2d 739, 742 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 955 (1956). *Smith* was one of three cases decided on the same day and denying reinstatement, back pay, and declaratory judgements. A footnote in *Smith* traces the "formula" back to *Powell* v. *Brannan*, 196 F.2d 871, 873 (D.C. Cir. 1952), a reduction-in-force case having no relation whatever to retirement. (*See* reference to "decisional leapfrogging" in Griswold, *The Judicial Process*, 28 Rec. A.B. City N.Y. 14, 24-25 (1973)).

Smith, *Gaines*, *Scroggins*, *McGlasson*, and *McFarland* dealt with forced retirements for mental conditions. *Fancher*, *Allen*, and *Polos* dealt with forced retirement for physical disability. No case dealt with a voluntary retirement claim for annuity, and in no case (except in *Allen*, overruled in *Polos*) did application of the "Scroggins formula" result in reversal.

We face here no settled case law. Sections 8347(c) and (d), and the "Scroggins formula" have appeared in the opinions of other courts with varying results, some rejecting it, *see: Campbell* v. *OPM*, 694 F.2d 305 (3d Cir. 1982); *Chase* v. *OPM*, 695 F.2d 790 (4th Cir. 1982); *Morgan* v. *OPM*,

675 F.2d 196 (8th Cir. 1982), some applying it, *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982); *McCard* v. *MSPB*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *OPM*, No. 82-1436 (D.C. Cir. May 17, 1983); *Pitzak* v. *OPM*, No. 82-1592 (10th Cir. July 14, 1983), and one acccepting it with a limitation, *Lancellotti* v. *OPM*, 704 F.2d 91 (3d Cir. 1983). Our independent consideration has led us to what is in our view the sounder conclusion.

If the cases of our predecessor court referring to the "Scroggins formula" were interpreted as holding that § 8347(c) and (d) leave room for judicial review of voluntary disability retirement annuity claims, those cases to that extent would have to be viewed as wrongly decided and overruled.

The concern that apparently lead to the initial application of the "Scroggins formula" by our predecessor court, i.e., that administrators might unfairly force individuals from federal employment with an attached mental condition "stigma", has been fully met by Congress' enactment of § 8347(d)(2). The cases dealing with that form of retirement are therefore simply no longer viable.

Because all references to the "Scroggins formula" by our predecessor court appear in opinions of that court dealing with forced retirement, the *Scroggins* line of cases cannot serve as a basis for an assertion of jurisdiction to review an MSPB decision on voluntary retirement like that presented here.

(b) *Review of Agency Action*

Treatment of 5 U.S.C. § 8347(c) in the courts since 1956 seems to have been influenced by an apparent tendency to resolve doubt in favor of assuring federal court review of every conceivable objection to agency action. The tendency has on occasion served well the paramount public interest in the administration of justice, and have avoided a slamming of the federal courthouse door in the face of persons entitled to be there. Courts should be equally zealous in avoiding the unauthorized jamming of the courthouse door. Persons entitled to be there are harmed when denied or delayed entry by a crowd which is there not because a

constitutional right is involved, or because a statute provides a right to be there, but only because a court had adopted an overly expansive view of its own jurisdiction.

In the present case, for example, it is nowhere asserted that Congress has ever specifically *granted* jurisdiction to any court to hear appeals from administrative decisions on claims for annuity by those who voluntarily retire. Whatever may be their "traditional powers", all federal courts are courts of limited jurisdiction. It is not within the powers, traditional or otherwise, of federal courts to fill every seeming jurisdictional void they may detect in congressional legislation; but if it were, thre is no void detectable in § 8347(c) and (d).[2]

The Administrative Procedure Act provides for judicial review of agency action, 5 U.S.C. § 704, but specifies that judicial review is *not* available when precluded by statute, 5 U.S.C. § 701(a). In *Dismuke*, 297 U.S. at 172, in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967), and in *Barlow* v. *Collins*, 397 U.S. 159, 166-67 (1970) (quoting *Abbott*), the Supreme Court has erected a presumption of judicial review over agency action. It has, however, been careful in those cases to recognize the right of Congress, within constitutional boundaries, to rely on the administrative process and to preclude judicial review. As above indicated, we hold § 8347(c) an express preclusion of judicial review. Hence the presumption outlined in *Abbott* is inap-

[2] The powers of federal courts have been the subject of controversy since long before those courts were born. There was deep distrust of a federal judicial system in the Constitutional Convention. See Farrand, *The Records of the Federal Convention*, (Rev. Ed. 1937); Prescott, *Drafting the Federal Constitution*, ch. 17 (1941). There was concern that the federal judiciary would find it had jurisdiction to achieve broad purposes of federal statutes. See 3 Elliott, *Debates*, 565. Early on, the Supreme Court held that inferior federal courts received no powers directly from the Cosntitution, but only such authority as may be vested in them by Congress. *Turner* v. *Bank of North-America*, 4 U.S. (4 Dall. 7) (1799); *McIntire* v. *Wood*, 11 U.S. (7 Cranch 503) (1813); *Kendall* v. *United States*, 37 U.S. (12 Pet. 524) (1939); *Cary* v. *Curtis*, 44 U.S. (3 How. 236) (1845), and that for jurisdiction to exist the Constitution must have given the capacity to take it and an act of Congress must have supplied it. *The Mayor* v. *Cooper*, 73 U.S. (6 Wall. 247) (1867).

plicable, and our holding here does not impinge upon or conflict with that presumption.

It is suggested that this court might reconcile the presumption of reviewability with the finality clause of § 8347(c) by noting the inclusion of OPM's fact finding role in that section, and by saying that Congress intended to preclude only a review of OPM's factual determinations. Then, we are asked to say, a claimant for a voluntary disability retirement annuity would retain a "right" to judicial review for a possible procedural or legal error by OPM or MSPB. We decline the suggestion. The question before us is not whether this or that type or breadth of judicial review would be in our lights advisable or appropiate. The question is whether any is authorized.

However attractive may have been the temptation to reconcile the reviewability presumption with § 8347(c) and (d) as they stood before the 1980 amendment, no such reconciliation is now possible. The current statute provides that OPM shall determine "question" of disability and that its "decisions" concerning such matters are reviewable under § 8347(d)(1) only by MSPB. Thus Congress has provided, not precluded, review of OPM's factual determinations. It lodged that function, however, in MSPB. The statute further provides in § 8347(d)(2) for judicial review of particular MSPB decisions, under a particular standard of review found in § 7703. Congress having so divided and allocated the review function between the executive and judicial branches, the courts are not at liberty to reallocate it.

Moreover, the factual determination that a voluntary claimant is not disabled can be expected to control the outcome, as illustrated by the virtually universal denial of relief, even in forced retirement cases, under the judicially crafted "Scroggins" type of review. Nor, the factual determinations being non-reviewable, is relief likely on legal or procedural grounds. As above indicated, one whose application for an annuity is denied after voluntary disability retirement is not by that denial alone deprived of a constitutional right. There being no liberty or fundamental pre-existing property interest at risk, the simplest proce-

dures adopted by the agency will avoid a claim of denial of procedural due process.

It is, of course, possible to posit a scenario in which OPM and MSPB might both act so irresponsibly and arbitrarily as to employ unacceptable interpretations of law, statutes, or regulations, and totally inadequate procedures, for the purpose of denying annuities to those who voluntarily retire. Conjecture cannot alone, however, serve as a grant of jurisdiction. A facile formula based on a fear of faceless functionaries would be such a grant, for the court would have to exercise jurisdiction to determine whether legal or procedural error had occurred. Allegations of procedural error are easily made, as were the assertions here of failure to follow procedures inapplicable to Lindahl.

Whether the supposed scenario is realistic, and whether it be of a nature and breadth to warrant judicial review of all MSPB decisions on all voluntary retirement claims, would be a matter for investigation and legislation (if deemed appropriaate) by the Congress, not the courts.

(c) *5 U.S.C. § 7703 and 28 U.S.C. § 1295*

Lindahl cites the broad provisions for review by this court of what he describes as "any" MSPB decision, and the grant of "exclusive" jurisdiction to this court over appeals from what he calls "all" MSPB decisions in 28 U.S.C. § 1295(a)(9). It is implied that a "conflict" or "anomaly" would somehow arise if, in the light of § 7703, it were held that §§8347(c) and (d) expressly preclude judicial review of voluntary disability retirement claims. We find no basis for that view.

First, retirement benefit claims are not adverse action claims. *Francher* v. *United States*, *supra*, 588 F.2d at 807; *Piccone* v. *United States*, 407 F.2d 866, 872 (Ct. Cl. 1969). No voluntary disability claims have been reviewed under § 7703. Respecting involuntary claims, it was the *Scroggins* line of cases, not § 7703, which was looked to as a basis for jurisdiction.

Second, there is no "conflict" or "anomaly" created when Congress provides different routes and different forums for enforcement of different statutory rights. Indeed, Congress

provided a divergent route in § 7703(b)(2) for a claim that an adverse action was based on discriminaton. Thus an anomaly is avoided, not created, when the court honors the express exception to its § 7703 jurisdiction appearing in § 7703(b)(2) and simultaneously honors the express exception to its § 7703 jurisdiction appearing in §§ 8347(c) and (d).

Third, there are numerous differences between an appeal from OPM's denial of a claim for annuity on voluntary retirement that may be brought to MSPB under § 8347(d)(1), and appeals that may be brought to this court under § 7703. The former may be brought by "individuals"; involve "procedures prescribed" by MSPB; and place the burden on the applicant, *Chavez* v. *OPM*, 6 MSPB 343, 353 (1981). Those differences warrant, if warrant were needed, a difference in congressional treatment.

Fourth, a specific statute dealing with disability claims prevails over a general statute dealing with appeals generally from decision of the MSPB. *HCSC-Laundry* v. *U.S.*, 450 U.S. 1, 6 (1981).

Decisions of MSPB that can be challenged by a *de novo* trial in the district court (i.e., those resolving discrimination claims), and OPM decisions that Congress has specifically said are not reviewable except by MSPB (§§ 8347(c) and (d)(1)(are clearly not encompassed within the words "any" and "all" that were used by some congressmen in discussing the jurisdiction provisions in the FCIA. S. Rep. No. 95-969, 95th Cong., 2d Sess. 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2784. It will not do to argue that references by some congressmen to review of "all" MSPB decision by this court resulted in a repeal, *sub-silentio*, of §§ 7703(b)(2) and 8347(c). Repeal of a statute should never be assumed. *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

Quite apart from the presence of §§ 7703(b)(2) and 8347(c) and (d), it is not true that Congress made "all" MSPB decisions appealable to this court. In 28 U.S.C. § 1295(a)(9), Congress provided this court with a jurisdiction over MSPB decisions different from that previously provided the Court of Claims and the regional Circuit Courts of Appeals. As discussed in *Lancellotti* v. *OPM*,

supra, 704 F.2d at 97-99, those courts had been stated to have jurisdiction over "*all final orders* of the Merit Systems Protection Board" except those in § 7702(b)(2) cases. 28 U.S.C. § 2342(6) (Supp. IV 1980). In contrast, the FCIA makes the jurisdiction of this court applicable to appeals "pursuant to sections 7703(b)(1) and 7703(d) of title 5". Appeals of MSPB decision under 5 U.S.C. § 1207 are directed to the regional circuits, not to this court. There is no appeal, even to the MSPB, under 5 U.S.C. § 3592.

As complicated and complex as the Civil Service Reform Act is, it is at least clear, when §§ 7703(b)(1) and 7703(d) are read in context, that among the final orders and decisiosn of the MSPB appealable to this court are those under § 7703(a)(1). Section 7703(a)(1), as applicable to this court, encompasses MSPB original jurisdictional cases and appeals properly brought to the MSPB under § 7701. Section 7701 itself encompasses agency decisions either specifically designated by the statute as appealable to MSPB under § 7701, e.g., 5 U.S.C. §§ 3593(c)(2); 3595(c); 7543(d); and 8347(d)(2); or those so designated by "rule or regulation".

The provision governing MSPB's jurisdiction, 5 U.S.C. § 7701, raises no conflict with our adherence to the statutory preclusion of judicial review present in §§ 8347(c) and (d). In connection with appeals to MSPB like Lindahl's, MSPB has by regulation elected to employ § 7701 procedures. *See* 5 CFR § 1201.3(a)(6). The question of whether MSPB correctly employs § 7701 procedures in exercising its review authority of particular agency decisions under § 8347(d)(1), however, is not before us. An MSPB election to treat its review authority under § 8347(d)(1) as permitting use of § 7701 procedures cannot constitute a grant of jurisdiction to this court to review all decisions MSPB reaches under § 8347(d)(1). *Schwartz* v. *Department of Transportation*, No. 83-768 (Fed. Cir. Aug. 23, 1983). Nor can that election work a repeal of § 8347(c). Nor is there reason to suppose that MSPB authority to render decisions and this court's jurisdiction to review MSPB decisions must be identical or coextensive.

To hold that judicial review of all § 8347(d)(1) decisions had all along been available under § 7703, would be to render superfluous Congress' action in § 8347(d)(2), making judicial review available for particular claims under § 7703.

We need not, and hence do not, decide in this case whether all decisions of MSPB under § 7347(d)(1) are denied judicial review by § 8347(c). If § 8347(c) is to have any meaning, there must be some decision of OPM that are final and conclusive and not reviewable except by MSPB under § 8347(d)(1). It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this court.

(d) *The 1980 Amendment*

It is suggested that Congress knew of *Scroggins* at the time of the 1980 amendment, and that it effectively ratified judicial review under the limited "Scroggins formula", because it did not specifically say it was not doing so. We are cited to statements of congressmen mentioning *Scroggins*, H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. 3 (1980), and to contrary statements of other congressmen who thought that all judicial review was precluded by § 8347(c). S. Rep. No. 96-1004, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5986, 5987; H.R. Rep. No. 96-1080, *supra*, at 4. Though OPM's director could not express the intent of Cognress, we are cited to a letter from him in which he acknowledged existence of the review referred to in *Scroggins*. H.R. Rep. No. 96-1080, *supra*, at 8-10. The legislative history contains no statement of the "formula", no recognition that the "formula" had been mentioned in forced retirement cases, and no express acknowledgement that the "formula" had resulted in virtually no reversals of the decisions reached in the administrative process.

We find no support for the view that the 1980 amendment merely expanded the "breadth" of review, in cases of forced retirement on mental condition, beyond the "limited" review said to be available for such cases in *Scroggins*. If that were true, it would, as above indicated, merely re-

move the viability of *Scroggins*. It would not establish that judicially created and judicially limited review had existed for other types of cases, such as the voluntary retirement type presented here. What did not properly exist cannot be expanded.

It is one thing to say on a particular record that Congress had incorporated the judicial "gloss" placed on a statute. It is another to say that a court's departure from an express preclusion of review is adopted unless Congress in reenacting the preclusion verbatim specifically adds "we meant what we said the first time". Whether a court may require Congress to specifically disallow review the court had "allowed" is not here a relevant consideration. In § 8347(d)(2) Congress not only allowed but legitimized judicial review in the type of case in which our predecessor court had said it was appropriate, while simultaneously reenacting the express review preclusion in § 8347(c) and making plain that §§ 8347(d)(1) and (d)(2) were exceptions to that preclusion.

That some congressmen and the director of OPM referred to the existence of a court-designed review formula, or that some congressmen said the law was not being changed, or that some criticized *Scroggins*, or that some said § 8347(c) barred all judicial review, cannot be controlling. We look not to conflicting comments of a few congressmen, but to what Congress did. What it did in 1980, as above indicated, was to add an *exception* to its prohibition of review in disability cases, and allowed judicial review when the government orders retirement for mental disability. What it did was to leave § 8347(c) and its finality clause untouched. The "law" that Congress did not change in 1980 was the law Congress enacted in § 8347(c) and never repealed.

CONCLUSION

A Congress frequently criticized for vastly increasing the jurisdiction of the federal courts, with insufficient concern for the impact of its legislation on those institutions, has enacted an employee retirement scheme which relies on the administrative process, and in 5 U.S.C. § 8347(c) and (d)(1)

excludes the courts from review of administrative decisions in at least those cases involving voluntary claims for disability annuities. That effective congressional solicitude for crowded court dockets, and for the effect of that crowding on deserving litigants, deprives no one of any constitutional or statutory right.

The statute, 5 U.S.C. § 8347(c) and (d), is clear and unambiguous. Whether the finality clause of § 8347(c) should have been from the outset honored by judicial recognition that jurisdiction was lacking is academic. Today this court applies to the case before it the statute as written.

ORDER

It is ordered that respondent's motion to dismiss for lack of jurisdiction be and it is hereby granted.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

APPEAL NO. 39-81

NICHOLS, *Circuit Judge*, concurring.

I agree with the judgment and join in it. Chief Judge Markey's able opinion I join in except where it is inconsistent with what follows.

First, I believe it is ill-advised to limit our holding to applicants for disability annuity who have themselves voluntarily retired from active employment because of disability. (a) The statutory preclusion of judicial review, relied on by the court, 5 U.S.C. § 8347(c), itself draws no such distinction, except in the category, not here involved, of involuntary retirement for mental disability. For this court to draw one belies our own conclusion that preclusion statutes mean what they say. (b) The distinction we draw will have unfortunate consequences in that persons of marginal disability will hang in and insist on involuntary retirement so as to safeguard their annuity rights, to the detriment of the federal service, and (c) the factual basis of the statement that Mr. Lindahl is a voluntary retiree is uncertain. It is clear he did not want to be retired except on the condition that he receive the annuity. That is why we have this lawsuit. If he put in an application for retirement that failed to make clear the precondition he had in mind, that may be dispositive of the present case, but only because nobody focused on the voluntary nature of the retirement, as an issue, and nobody took the trouble to clarify the record. Who said what to whom on what date is quite obscure. Nor is it clear whether Mr. Lindahl was adequately warned that by applying as he did, he sacrificed his active duty pay without obtaining assurance as to disability annuity. I would prefer

to assume in favor of Mr. Lindahl that the retirement was involuntary except insofar as he agreed with management that he was in fact disabled, and differentiate the case to that extent only from those in which the much discussed "Scroggins formula" was invented and applied.

The chickens will come home to roost in a whole series of cases in which it will be alleged that the "Scroggins formula" survives and has an area for application, despite the *Lindahl* decision, because the disability retirement was *de jure* involuntary, or actually involuntary in view of the course of discussion of the applicant's physical problems, between him and management.

Second, having noticed and acknowledged that decision of other circuits are in conflict as to whether the "Scroggins formula" undercuts the finality or preclusion language of § 8347(c), the court moves along without stating why the decisions applying the preclusion are preferred over those applying the formula. Though we are now to be, under the Supreme Court, the paramount authority to decide the issue under the Federal Courts Improvement Act of 1982, and none of these decisions bind us, they were rendered by courts having jurisdiction at the time, courts of last recourse as of right. None of the decisions, probably were products of such agonizing introspection as ours will be. None were rendered in banc. It is usual, however, for courts, federal and other, raised under our common law traditions, to regard decisions by other courts of equal authority as part of the problem to be dealt with, to be followed or explained away. I do not think the fact they are in conflict with each other is the only thing about them one need notice. There is a somewhat wooden quality about most of them. Those adhering to the formula adhere also to the often expressed judicial horror of leaving any executive branch decision immune to judicial review, without notice of the fact that this horror is much mitigated when it is a question of a money claim against the United States, as an annuity claim is, even apart from statutory preclusions. *United States* v. *Testan*, 424 U.S. 392 (1976). Those adhering to the preclusion likewise fail to notice how far the horror has often carried other courts, despite other express

and implied statutory preclusions. The proper technique of weighing this horror against a statutory peclusion is a subject nobody seems willing to discuss, and perhaps wisely. I come out with the unsurprising conclusion that the decision I agree with as to result are better considered, and I have at least one articulable reason for this which I will state *infra*.

A third and more serious objection I have to our generally able decision, is that it too ignores the striking contrast the "Scroggins formula" presents to the techniques of our highest court, and other courts, in dealing with "finality language" in other statutory contexts, and alleged to bar or curtail the judicial review that would otherwise occur.

The World War II Renegotiation Acts, 50 U.S.C. app. § 1191 and ff, both contained, originally or as amended, provision (subsection (e) of § 1191) that a party aggrieved by an order to eliminate excessive profits could file a petition with the Tax Court:

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency.

In *Lichter* v. *United States*, 334 U.S. 742 (1947), the Supreme Court, though viewing the Tax Court as an administrative agency, upheld the constitutionality of these arrangements as a war measure under the constitutional war power. In *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351 (1955), the Court gave the finality language a literal interpretation, holding it did not extend to questions as to what contracts were renegotiable, even though this necessarily underlay the issue of "amount."

The Renegotiaton Act of March 23, 1951, 50 U.S.C. app. § 1211 and ff, set up a scheme that was similar so far as concerned the role of the Tax Court, and in § 1218 had a similar finality clause. That Act was extended several times regardless of whether the *Lichter* grounds existed, *i.e.*, a state of all-out or total war. The circuits that considered the question refused to hold that any exception existed to the finality language, except review on "constitutional or

jurisdictional grounds." *Consolidated-Hammer Dry Plate & Film Co.* v. *Negotiation Board*, 375 F.2d 591 (7th Cir. 1967); *Boeing Company* v. *Renegotiation Board*, 325 F.2d 885 (9th Cir.), *cert. denied*, 377 U.S. 923 (1963). The rule then was that "amount" determinations, whether they related to fact or law, were reviewable only on "constitutional or jurisdictional" grounds. Whatever that was held not an "amount" determination was reviewable the same as any Tax Court decision by a court of appeals, when it concerned a federal tax. The Seventh Circuit, in its case, considered whether some "amount" holdings were "so arbitrary and capricious as to raise a constitutional issue" and stated they were not, but also said that its review of them was gratuitous. (375 F.2d at 594.)

All this is ancient history as the last extension of the Renegotiation Act has long since expired, but it does throw some light on the technique of applying finality clauses.

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876, provides that court-martial sentences, after proper review by military tribunals are "final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all * * * courts * * * of the United States * * *." In *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), it is held that this did not necessarily bar an Article III court from intervening by way of habeas corpus, injunction, or back pay suit in case of an unconstitutional or otherwise void court-martial. *United States* v. *Augenblick*, 393 U.S. 348 (1969) previously had reversed two decisions of the former Court of Claims that had sustained collateral attacks on court-materials by way of back pay suits, but paid insufficient respect to the finality language. It seems fair to say the distinguished record of the Court of Claims may have displayed such insufficient respect, not alone in enunciating the "Scroggins formula."

United States v. *Wunderlich*, 342 U.S. 98 (1951) reports an earlier losing encounter by the former Court of Claims with finality language. In that case the issue was the respect to be given to language then standard in government contracts, making decisions of contracting officers final in all cases of disputes with contractors, whether on issues of

fact or of law. The Court of Claims by long and generally accepted practice had read into this language an implied exception for decision "so grossly erroneous as to imply bad faith," *e.g.*, *Levering & Garrigues Co.* v. *United States*, 71 Ct. Cl. 739 (1931). The Supreme Court, in a decision that caused many tremors, held that the only permissible exception was actual fraud. Congress, by statute, reinstated the previous rule. 41 U.S.C. § 321, 322. See history of this issue in *Hoel-Steffen Construction Co.* v. *United States*, 684 F.2d 843 (Ct. Cl. 1982) in which it is pointed out that there is necessarily a great difference between contract and statutory finality of decision, the former not affecting the waiver of sovereign immunity and consent to be used as the latter often does.

Allowance of disability annuities to war veterans is a case decidedly parallel to the civilian annuities we have to deal with here.

The finality language in 38 U.S.C. § 211 bars judicial review of Veteran Administration decisions concerning veterans' benefits. It is not the same as § 8347(c) inasmuch as it is not limited to issues of disability and dependency and court review is expressly referred to. For whatever the point is worth, it may be noted that the Court of Claims never even in dictum pronounced any "Scroggins formula" type of exception to finality and the complete exclusion of the court from the area is rather assumed than asserted. Cases are, *e.g.*, *Martin* v. *United States*, 197 Ct. Cl. 1062 (1972); *Jennings* v. *United States*, 214 Ct. Cl. 789 (1977); *Jump* v. *United States*, 164 Ct.Cl. 453 (1964). In *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 51 U.S.LW. 4999 (June 27, 1983), the Court of Claims appears to recognize in dictum at 268 that this finality language provides "against any judicial scrutiny at all."

The Supreme Court in *Johnson* v. *Robinson*, 415 U.S. 361 (1974), held that § 211 did not bar judicial consideration as to the constitutional validity of provisions of the laws providing veterans' benefits, a conclusion based on the bare language of § 211 as well as its purposes as shown by legislative history. The decision is not therefore a matter of reading unstated exceptions into the finality language it-

self. Justice Brennan's care in framing the majority opinion so as not to do this is noteworthy.

The Supreme Court handed down in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982) a decision which has a powerful impact upon the matter at hand. It deals with Medicare reimbursement to health care providers. These are in two kinds, Medicare A and B. Medicare A is primarily for hospital care and hospitals are paid by the government through an intermediary. Medicare B is optional for beneficiaries, is primarily for doctors' fees and other nonhospital health care expenses. Annuitants who elect the coverage pay a small amount which entitles them to be reimbursed by the government for payments which they make direct to the providers, or they may assign their claims to providers who collect from the government as assignees. Judicial review in the district courts only under Medicare A is expressly allowed, in cases of dispute as to the compensation allowable to providers. Distinctions are made as to the extent of *administrative review* as to issues of eligibility, and quantum under B. Congress is shown by the legislative history to have omitted Medicare B claims from judicial review because it expected most of them to be too small to take the time of the courts, overlooking that a concern such as *Erika* might be assignee of hundreds of claims and thus have large sums at stake. If Congress had said nothing about review, *Erika* and all other providers could have sued in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491. The Supreme Court held, however, that the fashioning of judicial remedies for the A cases with nonjudicial review in the B cases, implies an intent that this is to be all. Such an implication is drawn from the bare text even before it is confirmed by the legislative history, showing the reason for the difference as stated above.

Thus there can be implied preclusions of judicial review where the finality of the administrative decision is made just as absolute as when the preclusion is express. The reversed decision below, *Erika, Inc.* v. *United States*, 634 F.2d 580, 587 (Ct. Cl. 1980), undertook to use the "Scroggins formula," urging in support of its position that the "Formula" cases, several of which it cited, showed that

even an express preclusion allowed its exceptions though unrecognized in the statute itself; still more then would this be true of a merely implied preclusion. In *Erika* the Supreme Court teaches that express and implied preclusions are equally effective.

Congress has stated the same view. 5 U.S.C. § 702, Pub. L. No. 94-574, Act of October 21, 1976, is a broad waiver of sovereign immunity and consent to be sued in the federal courts in cases "seeking relief other than money damages." It provides that it does not "affect other limitations on judicial review" or confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." The legislative history, H. Rep. No. 94-1656, 5 U.S. Code Cong. & Adm. News, 94th Cong. 2d Sess. 1976, shows that Congress considers a statute impliedly precludes judicial review if it contains any "implied preclusions" and description of one method of review impliedly precludes other methods. By this reasoning, the provision in § 8347(d) for judicial review of involuntary disability retirements for mental condition would preclude judicial review of ther disability retirement decisions even without the finality language in § 8347(c). Congress has put two locks on the door.

The circuit court decision adopting the "Scroggins formula" in their decision, relied on by the dissent herewith, in my view reveal how ill considered they are by their failure to deal with *Erika*. The OPM rightly relies on *Erika* as the strongest kind of Supreme Court support for its motion, citing it five times in its initial brief. Yet our majority opinion ignores *Erika* for reasons unfathomable by me.

In *Erika* we have the same court that first employed the "Scroggins formula" to undercut statutory finality, or express preclusion of judicial review, then for the first time after many years, proposing to extend the formula to another statutory preclusion, this time an implied one. At least I suppose that was the intent, though this was not expressly stated. The Supreme Court shoots this aircraft down in flames. If the formula still stands in the area of disability retirement, it stands as an odd anomaly which may not be, and never has been, extended to parallel situations.

The law normally dislikes oddities of that kind, but seeks to regularize and harmonize. One is reminded of the rule once enforced by Chief Justice Rugg upon the Massachusetts Supreme Judicial Court that it was never to overrule a decision of its own that on later reflection it perceived to be erroneous. It was only to restrict the disfavored precedent "to its own peculiar facts," a signal to the bar never to cite the case again.

The technique of applying a statutory preclusion of judicial review is not, however, the simple open-and-shut or black-and-white issue it is perceived to be in the able majority opinion. As stated by Justice Brandeis years ago, *Lynch* v. *United States*, 292 U.S. 571, 586 (1934), a statute denying a constitutional right will not be read as a preclusion to save its constitutionality, but will only be so read if the language of Congress is unequivocal and no other interpretation is possible. This will rarely occur. The apparently flat and sweeping preclusion of § 876 of the Uniform Code of Military Justice is read in *Schlesinger* v. *Councilman*, *supra*, as allowing all sorts of collateral attacks in civilian courts if an alleged constitutional violation is grave enough or if the court-martial decision is simply void. (As to what is or was a void court-martial *see* II *Court of Claims History* (1978) at 49.) This result is much aided by the legislative history showing that the language was never expected to be a barrier to habeas corpus in appropriate cases. In *Johnson* v. *Robinson*, *supra*, recourse is had to legislative history material to show that, despite sweeping language, preclusion of inquiry by a court as to the constitutionality of a statutory provision affecting veterans' rights was not intended.

United States v. *California Eastern Line, Inc.*, *supra*, shows a technique of literal construction of a statutory preclusion to save judicial review. Thus a preclusion of review as to "amount" of excessive profits determined in renegotiation is held not to preclude review as to what contracts are renegotiable, though the answer will govern "amount." In *Polos* v. *United States*, 621 F.2d 385, 391-92 (Ct. Cl. 1980), the suggestion is made or implied that the decisions as to disability and dependency, given finality by

§ 8347(c), are decisions as to question of fact, whereas the questions saved for judicial review by the "Scroggins formula" are questions of law. The idea is spelled out more expressly in *Lancellotti* v. *OPM*, 704 F.2d 91 (3d Cir. 1983). That case identifies a situation where "disability" *vel non* depends on the answer to a legal question: construction of a statutory provision for termination of status as a disability annuitant upon one's reaching a specified level of income from wages or self-employment.

This kind of reasoning certainly echoes that found in the Supreme Court precedents in their technique of construing statutory finality clauses. However, I do not think it is valid here because it deals with only one of what I have called double locks: the express preclusion but not the implied one. The interpretation of the decision given finality in § 8347(c) as those establishing facts only is possible but not required by the language of § 8347(c) standing alone, and is contradicted by the implied preclusion in § 8347(d), with the cross-reference from (c) to (d) added in 1980.

Mr. Lindahl's principal complaint of the MSPB decision is that it misallocated the burden of proof which he says should have been placed on the OPM, not on him. He next says it was a violation of "due process" to discharge him while his application to the OPM for disability retirement was pending undecided. This appears to be actually a complaint of failure to follow a governing regulation. Thirdly, he says the decision of the MSPB that he was not disabled is unsupported by substantial evidence. The first two issues would arguably be saved from dismissal by the "Scroggins formula" which he invokes, but not if it is repudiated as a rule of decision in this court, as I favor. The third issue is not possibly saved for him even by the "Scroggins formula" since that formula does not provide for substantial evidence review. The dissent therefore should concede dismissal of that issue, to be consistent with the formula.

In summary, my conclusion is that preclusion of judicial review is never absolute in life, but at the Supreme Court level review has never been practiced in defiance of preclusions as much as the "Scroggins formula" would require. The formula is at best a peculiar anomaly invoked in but

one class of case. Virtually it is an invitation to counsel to litigate any issue of statutory construction or interpretation of a regulation. As the Chief Judge writes, it was born of a judicial reluctance to be wholly bound from review of involuntary disability retirement cases where a desk official was given unregulated and unrestricted power to brand a resisting civil servant as mentally disabled. This situation is fully taken care of in § 8347(d)(2) and all other disability retirement rulings under § 8347(c) are at any rate subject to independent due process review by a quasi-judicial body that seems as well suited to perform the task, as the Tax Court was for renegotiations. Now the "Scroggins formula" remains to clutter and confuse the law in cases for which it was not devised, one that invites litigation in an area where Congress wished it not to be. We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective.

I would grant the motion as to all issues briefed for review by Mr. Lindahl.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

NIES, *Circuit Judge*, concurring.

I join in the opinion of the majority but I do so, in part, because of the issues raised by Lindahl's petition for review which are not discussed in the other opinions. Lindahl seeks judicial review essentially of two issues: (1) the fact of his disability and (2) the failure of the MSPB to impose the burden of proof on OPM as required by 5 U.S.C. § 7701(c). The "question of disability" is clearly precluded by 5 U.S.C. § 8347(c) from judicial review. I do not agree, if the majority so holds, that all aspects of the disability claim are precluded from judicial review, although the claimant would have to seek relief through a different forum since our appellate review is limited to involuntary mental disability cases.

The second argument merely illustrates the error of the MSPB in attempting to force all disability claims into § 7701. MSPB admittedly does not follow § 7701 in a case such as this one. However, a statutorily imposed burden of proof cannot be conveniently ignored.

Since the thrust of appellant's petition is to obtain judicial review of the fact of his disability, I would not transfer the case to the United States Claims Court, as appellant asks. Judicial review of that question is precluded.

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DAVIS, *Circuit Judge, with whom* FRIEDMAN, KASHIWA and SMITH, *Circuit Judges*, join, dissenting.

In my view the 1980 amendment of 5 U.S.C. § 8347 did not lessen or abolish the very narrow judicial review that has been accorded to disability retirement matters at least since 1956.[1] The legislative objective, rather, was to *expand* judicial review in the special area of involuntary mental-disability-retirement. I join, therefore, with the several courts of appeals that have come to the same conclusion. *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982); *Mccard* v. *United States*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *OPM*, (D.C. Cir., May 17, 1983); *Pitzak* v. *Office of Personnel Management*, No. 82-1592, (10th Cir., July 14, 1983); *see also Lancellotti* v. *OPM*, 704 F.2d 91

[1] See *Elmore* v. *Bruckner*, 236 F.2d 734, 736-37 (D.C. Cir.), *cert. denied*, 352 U.S. 555 (1956); *Murphy* v. *Wilson*, 236 F.2d 737 (D.C. Cir. 1956); *Smith* v. *Dulles*, 236 F.2d 739, 740, 742 (D.C. Cir.), *cert. denied*, 352 U.S. 955 (1956); *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962); *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct. Cl.1968); *McFarland* v. *United States*, 517 F.2d 938, 942-3 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1049 (1976); *Allen* v. *United States*, 571 F.2d 1411 (Ct. Cl. 1978); *Fancher* v. *United States*, 588 F.2d 803, 806 (Ct. Cl. 1978); *Polos* v. *United States*, 621 F.2d 385, 391-2 (Ct. Cl. 1980).

(3rd Cir. 1983).[2] Because of these recent opinions, which cover the ground, I shorten my statement.

The core of it is that (a) the standard of narrow judicial review had been utilized for many years when Congress considered the 1980 amendment;[3] (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of that Congressional consideration was the *over-narrowness* of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed, the then Director of OPM expressly told Congress that the prior standard would continue for non-mental disability cases, *see Turner* v. *OPM*, *supra*, slip op. at 9-10); (e) there is nothing in the Committee reports or the floor discussion suggesting that the prior judicial standard was no longer to be followed in the nonmental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).

In the face of that history, it is hard for me to think that, in explicitly *expanding* review for mental cases, Congress silently withdrew for non-mental cases the limited judicial review that had long been allowed. To paraphrase what the Supreme Court said in *Merrill, Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-2 (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another federal statute had incorporated a prior judicial gloss): "it is abundantly clear" that the *Scroggins* standard "was a part of the 'contemporary legal context' in which Congress legislated" in 1980. "In that con-

[2] In *Campbell* v. *OPM*, 694 F.2d 302 (1983), the Third Circuit seemed to view the 1980 amendment as abolishing all judicial review in non-mental disability retirement cases, but the later ruling in *Lancellotti* appears to have qualified *Campbell* by according judicial review to legal rulings bearing on disability retirement pay. 704 F.2d at 96-98.

[3] This standard is often called "*Scroggins*-type" review but it actually goes back about a dozen years before *Scroggins* was decided. *See supra* note 1.

text, the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the *Scroggins* standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, that language carried with it the existing judicial interpretation.

By the same token it is improper to decide now (as the majority intimates should be done) that the *Scroggins* reading was incorrect when first adopted in 1956 (and since followed) and should be jettisoned regardless of Congress' position in 1980. Because Congress "affirmatively intended [in 1980] to preserve" that standard we cannot and should not now rule to the contrary.

For these reasons,[4] the motion to dismiss should be denied and petitioner accorded the right to have his claim tested under the so-called *Scroggins* standard.

[4] These reasons apply *a fortiori* to the amendment made by the Civil Service Reform Act of 1978, as to which there is not the slightest indication of any purpose to change the then-existing standard of review.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

SMITH, *Circuit Judge*, with whom FRIEDMAN, DAVIS, and KASHIWA, *Circuit Judges*, join, dissenting.

I fully join Judge Davis' dissent, but I write separately because I believe it particularly important, at the threshold of this court's existence, to consider the overall statutory structure of the civil service provisions as they relate to this court's appellate jurisdiction. I am especially mindful that, under the Federal Courts Improvement Act of 1982, this court is now the *only* circuit-level forum for petitioners seeking judicial review of most agency actions under the civil service laws. With the majority's result, I fear, we have adopted an unnecessarily cautious and restrictive approach to our nation-wide jurisdiction in this area.

I.

The comprehensive appellate framework established over the considerable period of time between enactment of the Civil Service Reform Act of 1978 and the Federal Courts Improvement Act of 1982—and constructed by more than one Congress—does not present a model of clarity or singularity of purpose. Specifically, the statutory interrelationships are significantly preordained depending upon the section of the code through which one enters in search of the various paths of appeal through this maze. The majority has entered the maze through a portal which mandates a dead end; it errs by failing properly to consider and weigh the merits of the other paths.

A.

Beginning at section 7703(a)(1),[1] which is the jurisdictional provision for the Federal Circuit in the Civil Service Reform Act, this court has exclusive jurisdiction (*see* 28 U.S.C. § 1295(a)(9)) over "*a* final order or decision of the Merit Systems Protection Board" (emphasis supplied). An express exception to this inclusive jurisdiction is for discrimination cases, in section 7703(b)(2). Possible or partial exceptions may also be found in the civil service provisions dealing with review of Special Counsel cases[2] and Senior Executive Service removal.[3] Furthermore, section 7703(d) provides that the director of the Office of Personnel Management (OPM) may petition for review of "*any* final order

[1] All section references are to title 5, U.S.C., except where otherwise indicated.

[2] Sections 1206 and 1207 concern Special Counsel investigations or prohibited personnel practices and hearings and decisions thereon. Section 1206(c) gives the Special Counsel authority to request the MSPB to take action on a prohibited personnel action; § 1206(g) requires the Special Counsel, if it determines that disciplinary action should be taken against an employee, to proceed according to § 1207; § 1206(h) authorizes the Special Counsel to seek corrective action before the MSPB for a pattern of prohibited personnel practices not otherwise appealable to the MSPB under § 7701; and § 1207(c) provides an employee subject to disciplinary action under § 1206(g) with the right to obtain judicial review of a final order of the MSPB in the appropriate regional circuit. I do not attempt to sort out here to which circuit court (this court or regional circuits) appeals for various types of Special Counsel cases go. Suffice it to say, however, that the matter is more complex than the majority, citing § 1207 only, has suggested.

[3] Section 3592, concerning removal from the Senior Executive Service, allows a career appointee to request, in certain circumstances, an informal hearing before an official appointed by the MSPB, but denies that appointee the right to initiate an action with the MSPB under § 7701. The majority summarily concludes from this provision that the career appointee has neither MSPB nor court appeal rights in these circumstances. While this may be correct (*i.e.*, there may not be "a final order" of the MSPB), I am not prepared to so quickly hold without proper examination of congressional intent and the structure of this provision. (For example, §§ 3593 and 3595 authorize career appointees to appeal certain Senior Executive Service reinstatement or reduction-in-force actions under § 7701 to the MSPB.)

or decision of the Board" (emphasis supplied) and that the Federal Circuit may hear any such case.[4]

Section 7703(a)(2) also has implications for the jurisdiction of the MSPB and this court. It differentiates between the procedures to be followed in review of final orders or decisions "issued by the Board under section 7701" and those to be followed in review of other MSPB decisions. *See Phillips* v. *USPS*, 695 F.2d 1389, 1390 n.2 (Fed. Cir. 1982). Thus the MSPB has not one but a plurality of jurisdictional bases for its actions, and it is important to see what each is.

Section 7701(a) is clearly the main basis—it covers in essence all appealable agency adverse actions—and we have held that our jurisdiction of section 7701(a) actions is "plenary." *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1317 (Fed. Cir. 1983). Section 7701(a) is expressly made the jurisdictional basis for actions under sections 4303(e) (actions based on unacceptable performance), 7513(d) (adverse actions taken to promote the efficiency of the service), 7121(e) (grievance procedures), 7543(d) (actions against senior executives), and 3593 and 3595 (reinstatement or reduction in force in the Senior Executive Service). Section 5335(c) (withholding of periodic step increase), though it mentions no jurisdictional basis, has been held to be appealable under section 7701. *Meyer* v. *Department of Health & Human Services*, 666 F.2d 540, 544-45 (Ct. Cl. 1981). Likewise, many actions made appealable to the MSPB by OPM regulation (see section 7701(a), 5 C.F.R. § 1201.3(a)(8)) would be appealed under section 7701, though the regulations do not specifically mention it. *See, e.g.*, 5 C.F.R. § 351.901 (reduction in force); 5 C.F.R. § 300.104(a) (employment practices). Finally, section 8347(d)(2) (OPM mental disability) determinations are expressly reviewed under section 7701(a).

Non-7701(a) cases would include, first, section 7702 (discrimination) cases which do not come to the Federal Circuit at all. Secondly, section 8347(d)(1) (OPM physical disabil-

[4] It seems clear that "a" in § 7703(a)(1) means "any," and so would achieve parallelism with subsection (d)(1). Such interpretation, however, is not necessary to my views.

ity) determinations are also heard by the MSPB, but are either reviewed, as I see it, under *Scroggins* standards, *i.e.*, a lower standard than for section 7701, or, as the majority sees it, not at all, *i.e.*, at *much* lower standard than 7701. Thirdly, those non-7701(a) cases referred to in section 7703(a)(2), then, must include actions pursuant to sections 1206(c) and (h) (special counsel actions) and possibly 3592 (removal from the Senior Executive Service).[5] Finally, MSPB decisions regarding award of attorney's fees under section 7701(g)(1) do not originate in an agency but are nevertheless reviewable by this court. *See, e.g., Sterner* v. *Department of the Army*, 711 F.2d 1563 (Fed. Cir. 1983).

To sum up, if one starts with section 7703(a)(1), one finds that this court has jurisdiction of all MSPB decisions except discrimination cases and possibly certain Special Counsel and Senior Executive Service cases. MSPB decisions fall into five categories—section 7701(a), non-7701(a) (*i.e.*, those indicated by section 7703(a)(2)), physical disability determinations, attorney's fees awards, and discrimination—each of which categories has a different (or no) standard of review in this court.

B.

Starting instead at section 7701(a), the provision for MSPB jurisdiction, one immediately notes that its language is as broad as (or broader than) the provision for Federal Circuit jurisdiction in section 7703(a)(1). The MSPB has jurisdiction of "*any* action which is appealable to the Board under *any* law, rule, or regulation" (emphasis supplied). Based on this plain language, the MSPB has taken the position that 7701 is an umbrella provision, encompassing *all* substantive rights to appeal. In other words, all non-discrimination claims are funneled through section 7701 review by the board and thence to the Federal Circuit.

It is tempting to accept this view, for, since we have held that our section 7701(a) review authority is "plenary" (*Rosano*), this view would obviate the need for these many pages attempting to unravel the jurisdictional knot before

[5] *See* notes 2 and 3, *supra*.

us. I agree with the majority, however, that careful statutory construction cannot bring us to such an elegant conclusion. For example, if all review were either under section 7701 or 7702, then section 7703(a)(2) would be meaningless in suggesting non-7701 appeals to the Federal Circuit. Sections 1206, 1207, 3592, and 8347(d)(1), which expressly or apparently provide independent appeal routes to the MSPB, would be overriden.

C.

As to another alternate route, if one begins at section 8347, as the majority does, it seems immediately apparent that section 7701 does not apply to section 8347(d)(1) (physical disability) actions. Legislative history aside, the structure of subsections (c) and (d) makes it plain that a difference in treatment is intended between paragraphs (1) and (2): that MSPB reviews mental disability ((d)(2)) under 7701, while it reviews physical disability ((d)(1)) under (d)(1) itself, with procedures prescribed by the MSPB. There is therefore a conflict here with the plain language of section 7701(a), which covers "*any* action * * * appealable to the Board under *any* law." (Emphasis added.)

Moreover, as the majority discusses, the statute provides that mental disability ((d)(2)) cases are not only to be reviewed by the MSPB under section 7701 but also "shall be subject to judicial review under section 7703." Since this language is absent from the physical disability (d)(1) provision, the majority not unreasonably concludes that Congress meant to deny section 7703 judicial review to (d)(1) physical disability cases. The majority finds conclusive statutory support for this view in the section 8347(c) "finality clause."[6]

Viewed in isolation, then, section 8347 would suggest an appellate structure different from that suggested either by the MSPB or Federal Circuit provisions. Yet, even if one did not question the wisdom of determining overall appel-

[6] So persuasive is the so-called "finality clause" in the majority's view, however, that it proceeds to the next and, to my mind, wholly unnecessary step of abolishing even the long-standing *Scroggins* review. I respectfully part company with the majority at this point.

late structure from a small part of the whole rather than from one of the broader appellate provisions, the conflict remains.

II.

As the foregoing demonstrates, under the civil service laws the appellate structure can be a relative thing. By concentrating on section 8347, the majority has not eliminated or avoided anomaly but has fallen victim to this relativism and explicitly created an anomalous system which, even if it is the best one (which I do not believe), fails to account for the difficulties it engenders.

The most significant anomaly, to my mind, is the conflict between the majority's holding of no review and the plenary authority of the Federal Circuit to review as set out in section 7703(a)(1). Section 7703 contains broad and inclusive language. The Senate Report on the Civil Service Reform Act states that this section "applies to judicial review of *all* final orders or decisions of the Board * * *." S. REP. NO. 969, 95th Cong., 2d Sess. 62, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2784 (emphasis supplied). Under the Federal Courts Improvement Act, the *entire* jurisdiction created by section 7703 devolved upon this court. H.R. REP. NO. 312 at 18 ("jurisdicton * * * over *all* appeals from the Merit Sysems Protection Board" (emphasis supplied)); S. REP. NO. 295, 97th Cong., 2d Sess. 21, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 31 ("jurisdiction of *any* appeal from a final order or final decision of the Merit Systems Protection Board" (emphasis supplied)). There is absolutely no reason to believe—and numerous reasons to doubt—that Congress intended this court to approach its MSPB jurisdiction with the extreme caution practiced by the majority.

A more particular anomaly is created by the majority with respect to section 7703(d)—OPM petition for review of *any* MSPB decision. I have already noted that the majority too easily implies a total lack of judicial review for voluntary retirees in physical disability cases, notwithstanding the fact that in almost a quarter century of experience under the *Scroggins* formula there has been no jamming of

the courthouse door by the few fingers that have grapsed it. Amazingly enough, the majority also chooses this opportunity to preclude judicial review in these cases for *OPM* as well. This despite the express language of section 7703(d)—"*any* final order or decision"—and the absence in the briefs and arguments of any in-depth discussion of section 7703(d) and its purpose. In order to vest its decision with an aura of consistency the majority not only closes the courthouse door on the fingers of individuals but slams it shut on OPM in 8347(d)(1) cases. Had it not, a reasonable reader of section 7703(d) would be astonished to find that discretionary review of these cases in this court is available to OPM, whereas an individual has *no* review.

While I readily admit that anomalies in this complex area abound, in my view the better approach is, as I explain below, to let stand the limited *Scroggins*-level review for individuals as well as the plain language of section 7703(d) pertaining to OPM review. This approach results in equal if not greater consistency than the majority's all-or-nothing sand, since the level of review OPM may receive in this court parallels that of the individual under *Scroggins*: both aim to catch the worst abuses of the administering agency. *See* S. REP. NO. 969 at 64, 1978 U.S. CODE CONG. & AD. NEWS at 2786.

Another anomaly resulting from the majority's position is that it results in denial of review of a class of persons—"individual[s]" under section 8347(d)(1)—broader than that granted under sections 7703 and 7701—"employee[s] or applicant[s] for employment." At least with the *Scroggins* approach, these "individual[s]" (presumably including at least beneficiaries of employees) receive some type of review, although less than the full 7703 review for "employee[s] or applicant[s] for employment." Anomalies exist either way, but I believe my approach results in less injustice.

Finally, the majority's result is at odds with the broad language of section 7701. Section 7701 covers "any action which is appealable to the Board under any law"; section 8347 fits within "any law." Since all section 7701 actions are

reviewable by this court, a conflict arises, for which, unfortunately, the majority offers unsatisfactory explanation.

III.

Given the opposing yet, when viewed in isolation, reasonable results which obtain when one tackles this statutory construction problem beginning at each of the above three starting points, a thoughtful person might conclude that either result (jurisdiction or no jurisdiction) is proper. However, tipping the scales in favor of at least some sort of review is, in my opinion, the law of the land that, absent clear and convincing evidence of congressional intent to preclude the important right to judicial review, review must be granted. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). When the *Abbott Laboratories* presumption of review is combined with the 1980 activities of Congress in amending section 8347(d), which Judge Davis has succinctly described in his dissent, and the overall appellate framework I have attempted to describe here, I am firmly persuaded that at a minimum Congress intended the *Scroggins*-level of review to apply to physical disability cases. For this court not only to hold, as the majority does, that section 7703 review does not apply here, but to backtrack and eliminate even the barest of *Scroggins*-type review, is an unnecessary abdication of our jurisdictional and statutory responsibilities. The majority's holding, totally barring review in these cases, will apply to all petitioners who would seek circuit court review for, under the Federal Courts Improvement Act, it is only this court to which they may now turn.[7]

[7] Certainly courts should not strain for jurisdiction where it plainly does not exist, but that "canon" loses some strength where there is a long history of *some* jurisdiction. Furthermore, it should not be forgotten that, although the Federal Circuit is not "The Civil Service Court" any more than it is "The Public Contracts Court," or even "The Patent Court," Congress has assembled this bench of judges with broad and diverse backgrounds for the purpose, among others, of establishing as much uniformity as practicable in the civil service area. That legislative policy would be defeated if we choose the path of least jurisdiction when there is no clear mandate to do so. Indeed, there is strong evi-

IV.

I respectfully dissent, and presume to submit the following diagram of the appellate structure created by the Civil Service Reform Act and the Federal Courts Improvement Act, which harmonizes as much as possible all of the provisions of the acts. (To accommodate the majority's position one need only make the dashed lines solid and remove the *Scroggins* and OPM references.) This diagram is, of course, not the definitive word of this court in this complex area, but I hope that it may serve as a useful analytical tool for those entering this maze of appellate jurisdiction.

dence in the legislative history of the Federal Courts Improvement Act that the presumption should be in favor of jurisdiction in those areas where Congress has expressly spoken for and created a court for the purpose of advancing uniformity.

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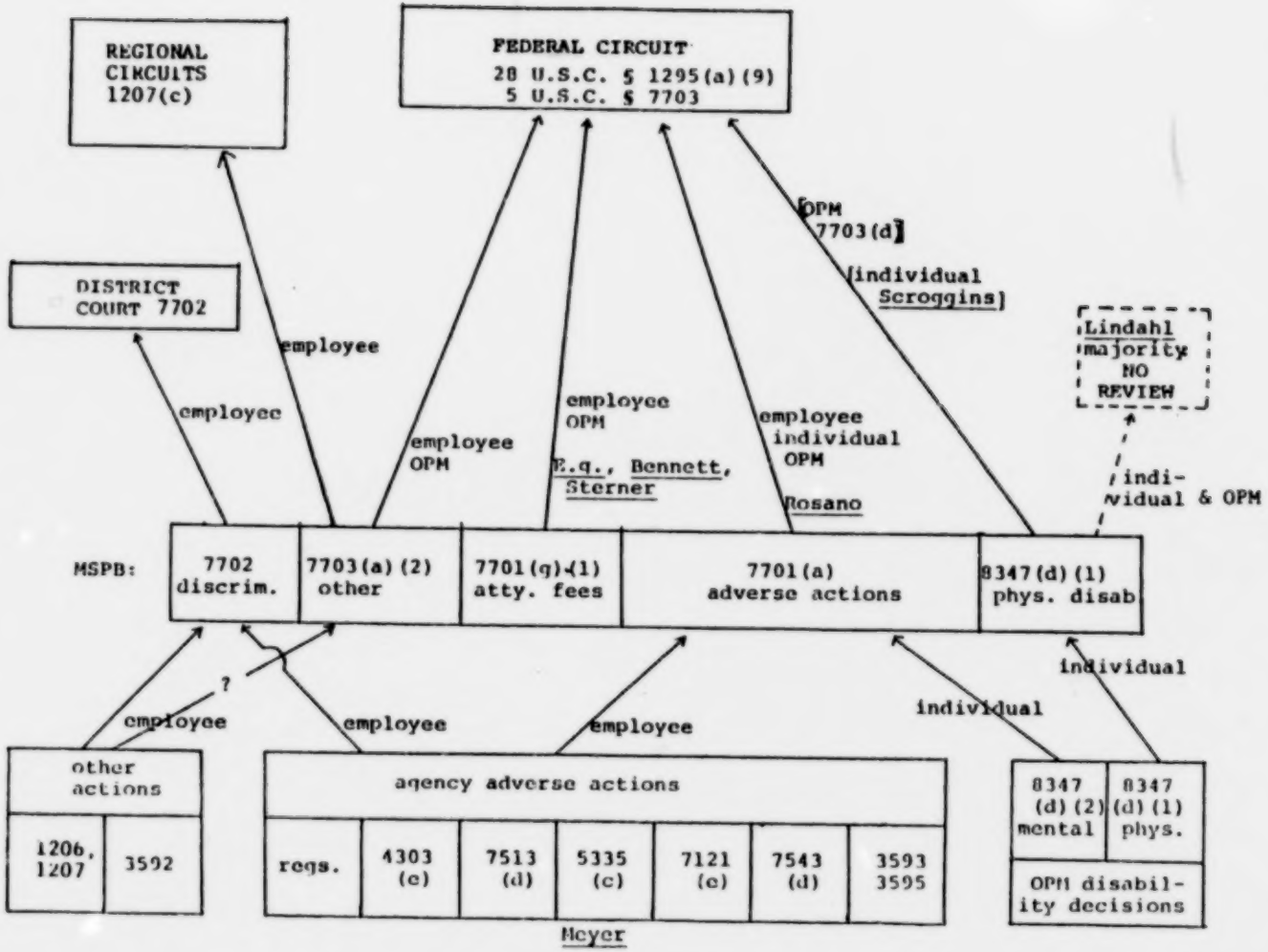

Supreme Court of the United States

No. 83-5954

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Federal Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

JUNE 18, 1984

Office Supreme Court, U S
FILED
AUG 2 1984
ALEXANDER L. STEVAS
CLERK

(5)

No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

---

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit has jurisdiction pursuant to 28 U.S.C. 1295, 5 U.S.C. 7703, and 5 U.S.C. 8347 to review decisions of the Office of Personnel Management and the Merit System Protection Board taken in violation of statutory and regulatory procedures governing disability retirement of federal employees.

2. Whether the Office of Personal Management and the Merit System Protection Board violated LINDAHL's rights to due process of law by (a) failing to retain Petitioner in federal employment while his claim for disability retirement was pending review in contravention of FPM 831-1 and by (b) imposing the burden of proof on LINDAHL at the hearing before the Merit System Protection Board in contravention of 5 U.S.C. 7701(c).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (A 45-85)[1] is reported at 718 F.2d 391. The decision of the Merit System Protection Board (A 28-41)[2] is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit (hereafter "Federal Circuit") was entered on September 22, 1983 (A 45). The petition for a writ of certiorari was filed on December 15, 1983. It was granted on June 18, 1984 (A 87). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The authority relied upon include the Fifth Amendment to the United States Constitution, 5 U.S.C. 7701, 5 U.S.C. 7703, 5 U.S.C. 8334, 5 U.S.C. 8337, 5 U.S.C. 8347, 28 U.S.C. 1295, 5 C.F.R. 1201.56 and FPM 831-1. (See Appendix to Petitioner WAYNE LINDAHL's[3] brief (hereafter A.B.).

STATEMENT

After working for the Department of the Navy for over ten years, naval officials first notified LINDAHL on September 4, 1979 that they would be discharging him due to his physical disability caused by his bronchitis. The very next day LINDAHL filed for disability retirement. LINDAHL was separated on October 5, 1979 and six months later on April 8, 1979 the Office of Personnel Management (hereafter "OPM") notified LINDAHL that his application for disability retirement was denied. Upon reconsideration it was again denied by OPM

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[1] All references to Joint Appendix will be "A".

[2] Hereafter all references to Merit System Protection Board will be "MSPB".

[3] Hereafter references to petitioner will be "LINDAHL".

on December 4, 1980. LINDAHL appealed to the MSPB. On May 8, 1981 it denied his appeal. LINDAHL then petitioned the Court of Claims on June 10, 1981. The case was transferred to the Federal Circuit on October 1, 1982. Upon motion to dismiss of the OPM, the court dismissed LINDAHL's petition on September 22, 1983.

LINDAHL first worked for the United States Navy in 1944 as an active duty member. He continued there for nine of the ten year period until 1953. In 1968 LINDAHL became a civilian employee for the Navy at Mare Island Naval Support Activity. He was first a welder and in 1972 he became a security guard GS-5 (R.I. 47-53).[4] The major activity of the Navy at Mare Island is the repairing and painting of naval vessels. As a result, there is a considerable amount of sandblasting, spraypainting and use of solvents on the base (R.II. 14-21).

Beginning in September 1975 LINDAHL began to experience problems with his lungs. For the two subsequent years, LINDAHL was treated by his medical doctor, Beverly Allan, for chronic bronchitis on seventeen separate occasions. His cough was uncontrollable and he was often unable to work (R.I. 75-76).

Based on the medical report of his physician that he was totally and permanently disabled due to acute and chronic bronchitis caused by industrial pollutants at his job, LINDAHL applied for a disability retirement annuity on February 21, 1978 (R.I. 102-3). Two medical doctors working for the Navy and Civil Service Commission examined LINDAHL and diagnosed his condition as acute and chronic bronchitis (R.I. 125, 134). One of them, Dr. J. P. Williams, also stated that LINDAHL was disabled for his position (A 2-6).

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[4] R.I. or R.II. refers to Part I or Part II of the Record of the MSPB filed in the Federal Circuit. Part I includes Enclosures 1 to 8 and is the record from OPM and will be designated R.I. Part II is the transcript of the hearing before the MSPB and will be designated R.II.

Nevertheless, on July 28, 1978, the Civil Service Commission denied LINDAHL's first application on the grounds of insufficient evidence to indicate total disability (R.I. 100-101). LINDAHL did not appeal the denial.

In January 1979 LINDAHL was hospitalized for one week due to his condition (A 7-8). On June 26, 1979 Dr. Allan notified LINDAHL's employer in the Navy that he was "incapable of working" due to "pollutants in the work atmosphere" (A 9). As a result, LINDAHL was placed on limited duty status.

On September 4, 1979 LINDAHL was given advanced notice by the Navy that he would be separated due to disability caused by his bronchial condition (A 10-12). In reliance on the action by the Navy, LINDAHL filed a form with the Department of the Navy on September 5, 1979 requesting that he be retired due to his bronchial disability (R.I. 83-84).

On September 17, 1979, the Commanding Officer of the Naval Support Activity notified LINDAHL that he would be separated as a security officer on October 5, 1979 because of physical disability (A 13-14). This was done in violation of Federal Personnel Manual (FPM) Section 831-1 which required that OPM retain an employee in active duty status pending decision on an application for disability retirement (A.B. 14a).

LINDAHL was terminated on October 5, 1979 due to physical disability, In reliance on the disability termination, he filed a formal request for disability retirement on October 9, 1979 (A 17-20).

On April 8, 1980 LINDAHL was notified that his application for disability retirement was disapproved because, "total disability for useful and efficient service in the above position (security officer) is not shown" (A 21-22). LINDAHL then filed for reconsideration.

On May 15, 1980 Dr. Allan, in a medical report, stated that LINDAHL "cannot safely and effectively work in any area that subjects him to pollutants or other irritants," and "he is

incapable of working at Mare Island Naval Shipyard" due to "attacks of severe bronchitis" (A 23-24).

On December 4, 1980 OPM, after reconsideration of LINDAHL's application, stated, "we lack objective medical findings to support a sustained condition of total disability for your position held" (A 27).

On January 5, 1981 the Commanding Officer of Naval Support Activity, Mare Island, stated that LINDAHL was "terminated due to your physical inability to perform in the position" and would not be rehired (R.I. 6).

An application was filed with the MSPB on January 12, 1981. A hearing was held on March 20, 1981 during which the MSPB hearing officer placed the burden of proof on LINDAHL in violation of Section 7701(c) and 5 C.F.R. 1201.56 (A 31). No witnesses or representatives ever appeared for OPM or the Department of the Navy. The only witnesses and evidence were presented by LINDAHL. Five supervisory personnel testified that LINDAHL's bronchitis prevented him from working (R.II passim).

The MSPB ruled against LINDAHL. It stated that 5 U.S.C. 7701(c)[5] and the governing regulation of the OPM, 5 C.F.R. 1201.56(a)(iii), provided "that in appeals before the MSPB, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence . . ." (A 29). However, the MSPB went on to hold that the burden was on LINDAHL to prove by a preponderance of evidence that he was entitled to the disability retirement since he had a better knowledge of his condition (A 30). The MSPB ruled that LINDAHL was not disabled to the extent required for an annuity because he was not totally disabled for useful and efficient service (A 40).

LINDAHL filed an appeal in the Court of Claims on June 10, 1981. On October 1, 1982 the case was transferred to the

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[5] All references to 5 U.S.C. will be by "Section".

Federal Circuit pursuant to the Federal Courts Improvement Act, i.e. 28 U.S.C. 1295(a)(9). The government moved to dismiss on the grounds that judicial review was precluded by Section 8347(c) (A 45-46).

The Federal Circuit granted the government's motion to dismiss for lack of jurisdiction. The court held in banc (plurality of decision of only five of eleven judges and two limited concurring opinions) that 8347(c) precluded judicial review of all decisions of disability retirement of the MSPB, other than those involving forced retirement for mental disability (A 48, 58).

The Court stated that it will not assume jurisdiction to review voluntary disability retirement decisions of the OPM and MPSB even where the petition alleges (1) that the actions of the agency in separating an employee violated their own regulations and (2) the actions of the hearing officer in allocating the burden of proof violated agency regulations and a specific statute (A 54).

The Court held that LINDAHL would be entitled to judicial review of MSPB voluntary disability retirement decisions only if he cited "constitutional infirmity in the legislation governing disability retirement or in the classifications made in the legislation" (A 50).

Next, the Federal Circuit ruled that it is not bound by the Supreme Court decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967) and its progency that there is a presumption of judicial review over agency action. It based its ruling on the belief that Section 8347(c) on its face states that MSPB action is final and consequentially unreviewable by the federal courts (A 53-54). It overruled twenty-four years of precedent allowing limited judicial review in this area (A 52).

Next, the Court ruled that Section 7703(a)(1), which provides for appeals for all MSPB decisions to the Federal Circuit, is not applicable. It held that appeals of MSPB decisions on voluntary disability retirement claims are not appealable by claimants or by the OPM (A 56).

There were two concurring opinions. One by Circuit Judge Nichols agreed with the majority, but stated that "my conclusion is that preclusion of judicial review is never absolute in life" (A 69). The other, by Circuit Judge Nies, stated that she joined the majority opinion, but that not all aspects of a disability claim are precluded from judicial review (A 71).

Four other Circuit Judges dissented in two separate opinions. Their position was that prior to 1980, judicial review of disability retirement claims was limited pursuant to the *Scroggins*[6] formula. When Congress amended Section 8347 in 1980, it expanded judicial review in the area of involuntary mental disability retirement. Congress knew that limited review of all MSPB disability decisions was available prior to the amendment. The OPM Director had told two Congressional committees that the prior standard would continue for voluntary disability retirement cases. And Congress had not changed the wording of the finality clause. Therefore, according to the dissent, Congress "intended to preserve that remedy" (A 74).

The dissent also stated that Section 7703(a)(1) provides for review of all decisions of the MSPB, except for those of discrimination. Therefore, Section 7703 controls Section 8347(c). Finally, Section 7701 covers any agency action appealable to the MSPB and all Section 7701 actions are reviewable by the Federal Circuit pursuant to Section 7703 (A 80-82).

SUMMARY OF ARGUMENT

A. The Federal Circuit has jurisdiction to review decisions by the OPM and MSPB for possible legal error, procedural error or failure to follow statutory guidelines in administering employee disability retirement annuities.

There is a recognized duty of Article III courts to require a governmental agency to follow the procedural and substantive framework established in the statutes and the regulations that

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[6] *Scroggins* v. *United States*, 397 F.2d 295 (Ct. Cl. 1968), *cert. denied* 393 U.S. 952 (1968).

are administered by the agency. The courts have the duty to prevent the agency from violating constitutional rights. *Dunlop* v. *Bachowski*, 421 U.S. 560, 567-568 (1972).

Likewise, this Court has consistently held that where a federal executive official has exceeded its statutory authority, the Court will review the action to determine whether the official was acting within the scope of its lawful powers. *Harmon* v. *Brucker*, 355 U.S. 579 (1958).

Administrative action of the executive department in violation of its own regulations establishing procedures for a hearing and review are invalid.

The OPM and Department of the Navy violated their own regulations by separating LINDAHL while the application for disability retirement was pending. Next, at the hearing before the MSPB, the hearing officer placed the burden of proving that the agency's decision was not supported by a preponderance of the evidence on LINDAHL in contravention to Section 7701(c) and federal regulations (5 C.F.R. 1201.56(a)). (A.B. 20a)

These violations were due process violations of LINDAHL's rights and were mandated to be reviewed by the Federal Circuit under the *Dunlop* and *Harmon* principles.

In addition, the right to a retirement annuity is a vested property right that is entitled to the protection of due process requirements. LINDAHL contributed part of his wages to the fund while a federal employee. And under the scheme of the Civil Service Retirement Act, he must be given an annuity if he fulfills the requirements for disability retirement under Section 8337. The courts have general jurisdiction to protect this right. *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

B. The finality language of Section 8347(c) has generally not been regarded as a complete bar to judicial review of determinations of the Civil Service Commission, OPM or MSPB.

1. Instead, Section 8347(c) has been consistently interpreted by all three of those agencies as permitting judicial

review of legal and procedural errors and as barring review only of factual determinations of medical disability. Since 1956, the courts have consistently held that Section 8347(c) limits judicial review of agency disability retirement determinations. It is recognized where there had been a substantial departure from important procedure rights, a misconstruction of governing legislation or some like error going to the heart of administration action.

2. Congress in its recodification of Section 8347(c) has never refuted this interpretation of limited judicial review of disability retirement determinations. Moreover, in the absence of a clearly expressed intent to the contrary, the revision or recodification of a statute by Congress indicates approval of judicial and administration interpretations made prior to its reenactment. The revisions of Section 8347(c) between 1956 and 1978 establish Congressional approval of judicial interpretations of Section 8347(c). *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

3. The legislative history of Congress of the 1980 amendment to Section 8347 indicates that Congress intended to maintain limited judicial review for legal errors of voluntary disability retirement and to expand limited judicial review of actions in the area of forced mental disability retirement to factual and legal determinations made by the agency. At the Congressional hearings both OPM Director Alan K. Campbell and Associate Director Gary Nelson represented to the Congressional committees that judicial review for voluntary disability determinations should continue as it had in the past and be made only for legal errors of the agency, i.e. for procedural error, misconstruction of governing legislature, or error going to the heart of administrative determination. Congress discussed this limited judicial review, and never expressly eliminated it. Congress was also informed of the abuses in the arena of retirement for mental disability as a method of unjustly terminating federal employees. As a result of this knowledge, Congress amended the statute to eliminate this abuse by expanding judicial review of agency initiated mental disability retirement. *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982).

C. The Federal Circuit has jurisdiction under Section 7703 and 28 U.S.C. 1295 to review any and all final decisions of the MSPB. The plain wording of these statutes, as well as the legislative history, indicate that there were to be no exceptions to this provision. The effect of the Federal Circuit's decision is to prevent an entire class of citizens from having a forum in which to adjudicate procedural and legal violations by an executive agency. The interpretation of Section 7703 and 28 U.S.C. 1295 which prohibits judicial review is in contravention of the broader principle that the courts will not construe an act in a manner which runs counter to the broad goals that Congress sought to achieve. Congress passed the Civil Service Reform Act to correct abuses of federal employees' rights in the federal system. It also intended to achieve uniformity of decisions by passing the Federal Court Improvement Act. This decision frustrates those goals.

D. Both OPM and MSPB denied important procedural rights to LINDAHL. The MSPB placed the burden of proof on LINDAHL at the hearing in contravention to Section 7701 and 5 C.F.R. 1201.56. In addition, the OPM and Department of the Navy denied LINDAHL the right to continued employment pending determination of his disability retirement by the OPM in violation of FPM 831-1.

LINDAHL was denied his statutory rights and his constitutional rights to due process of law. As such, this Court should reverse the decision of the Federal Circuit, declare that the Federal Circuit has jurisdiction here, order both OPM and MSPB to follow the legislative mandate in Section 7701 and FPM 831-1, send the case back to MSPB for a new hearing and award back pay to LINDAHL from October 5, 1979 to December 4, 1980.

ARGUMENT

I. THE FEDERAL CIRCUIT HAS GENERAL JURISDICTION TO PROTECT THE RIGHTS CONFERRED BY STATUTE AND REGULATION TO FEDERAL EMPLOYEES

A. Congress Granted Two Statutory Rights To LINDAHL Which The Federal Circuit Refused To Protect.

The interpretation of Section 8347(c) and Section 7703 pertaining to disability retirement by the Federal Circuit below raises fundamental constitutional issues that must be resolved. The holding recognized that a right to a retirement annuity was created pursuant to statute of Congress (A 46). However, the court below ruled that Congress has not "specifically *granted* jurisdiction to any court to hear appeals from administration decision on claims for annuity by those who voluntarily retire" (A 53). Nor is there any right, it held, to review legal or procedural errors committed by the administrative agency since "the simplest procedures adopted by the agency will avoid a claim of denial of procedural due process" (A 54-55).

This Court has consistently held that where the absence of jurisdiction of the federal courts would result in the sacrifice of a right created by Congress, then the inference is very strong that the Congress that enacted the right intended the statute controlling general jurisdiction of the federal courts to govern. *Texas & N.O.R.R. Company* v. *Brotherhood of Railway and Shipping Clerks*, 281 U.S. 548 (1930); *Virginia Railway Company* v. *System Federation, No. 40, R.E.D.*, 300 U.S. 515 (1937). "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom* v. *Kyne*, 358 U.S. 184, 190; *A.F. of L.* v. *NLRB*, 308 U.S. 401 (1948). Those cases involved the rights of federal employees to collective bargaining as granted by Congress. If the courts failed to give any statutory remedy to enforce the labor act, it would

have robbed the act of its life and prevented its purpose from being realized.

From the earliest time in this century, this Court has held that federal courts have general power of jurisdiction to grant relief against the action of a federal official where the agency involved has exceeded its statutory authority. *American School of Magnetic Hearing* v. *McAnnulty*, 187 U.S. 94 (1902). The interpretation by executive officials of acts of Congress does not bind the federal courts and do not prevent them from reviewing that interpretation or action taken by those officials. *Reeves* v. *Ainsworth*, 219 U.S. 296 (1911). Moreover, action of a federal executive official in discharging federal personnel in contravention of a Congressional act can be reviewed because the case involves the construction of a general statute of the United States. *Patterson* v. *Lamb*, 329 U.S. 539, 542 (1947); *Billings* v. *Truesdale*, 321 U.S. 542 (1944).

In *Harmon* v. *Brucker*, 355 U.S. 579, 581-582 this Court held:

> "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers . . . The District Court had not only jurisdiction to determine its jurisdiction, but also power to construe the statutes involved to determine whether the respondent did exceed his powers."

In the decision below, there are two statutory provisions that the Federal Circuit chose not to protect. The first concerns the right to an annuity for disability retirement. Under Section 8334, a federal employee contributes 7% of his weekly salary to the retirement fund pursuant to Congressional mandate. This right vests where the employee has five years of continuous employment and is found to be totally disabled. The retiree is then entitled to an annuity paid from the fund.[7] An annuity under the Civil Service Retirement Act has been held to be a vested property right of the annuitant because the

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[7] See Section 8337 (A.B. 12a) and Section 8334 (A.B. 8a).

retiree contributes to it from his (her) salary. It is not a mere gratuity. *Dismuke* v. *United States*, 297 U.S. 167 (1936). Such benefits are merely deferred compensation for employee services. The interest in retirement payments is a property right and protected by the Constitution since it is earned income. *American Postal Workers Union, AFL-CIO* v. *United States Postal Service*, 707 F.2d 548, 554 (D.C. 1983) *cert. denied* ___ U.S. ___ 104 S.Ct. 1594 (1984).

Likewise, the retirement benefits are part of the contractual rights of an employee. Once they vest upon retirement, they are a valid property interest that cannot be taken without just compensation. *Lynch* v. *United States*, 292 U.S. 571, 579-580 (1934).

LINDAHL therefore has a vested property interest in his annuity for disability retirement. It is a right that was conferred by statute and created by the contributions that LINDAHL made to the fund. But the right would be sacrificed if the Federal Circuit decision below is upheld. For it would be a hollow and empty right to an annuity if it could not be enforced in federal court. An inability to challenge agency action taken in violation of statutory or regulatory provisions that resulted in a denial of disability retirement annuity would rob the Civil Service Retirement Act of its vitality and would thwart its purpose. Congress gave federal employees a right to retirement disability and it must have intended that the courts have the power to enforce it.

The second statutory issue concerns the procedural rights that Congress gave to a federal employee at MSPB hearings. The OPM must carry the burden of proof as to the lack of disability of LINDAHL.[8] At the MSPB hearing, the hearing

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[8] Section 7701(c) places the burden of proof on the OPM to show that LINDAHL was not disabled. OPM initiated the separation for disability. The court below in its plurality decision attempts to state that this is a voluntary disability retirement claim. However, the facts show otherwise. The Navy notified LINDAHL that he was

officer failed to place any burden on the OPM. In fact, the OPM did not appear at the hearing by representative. Nor did OPM produce any witnesses or testimony. Instead, LINDAHL had to go forward with the burden of proof. He produced five lay witnesses who all substantiated his inability to carry out his assigned duties due to his chronic bronchitis (R.II. passim).

It is well established that procedural due process prohibits the deprivation of liberty and property. *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972). The extent of protection to be afforded to persons by procedural due process is greatly influenced by the grevious loss he (she) may suffer. *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970).

The concept of the burden of proof and the standard of proof is a concept that is embodied in the Fifth Amendment's Due Process Clause in civil cases. *Santosky* v. *Kramer*, 455 U.S. 745, 754 (1982); *Woodby* v. *INS*, 385 U.S. 276, 285 (1966). The function of the burden and standard of proof in civil cases is "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington* v. *Texas*, 441 U.S. 418, 423 (1978). This reflects how the risk of error should be distributed between the litigants and the weight of the private and public interests involved. *Herman & MacLean* v. *Huddlestone*, ___ U.S. ___, 103 S.Ct. 683, 690 (1983).

Where the government has the burden of proof in civil matters, it must support its allegations by "clear, unequivocal and convincing evidence." *Woody* v. *INS*, 385 U.S. 276, 285.

This Court in *Dismuke* v. *United States*, 297 U.S. 167 ruled that the lower court had jurisdiction to ascertain whether the

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being separated for disability reasons on September 4, 1979 (R.I. 34-35) (A 10). LINDAHL, in reliance, filed for disability retirement after this notice. The concurring opinion by J. Nichols recognized the problem and stated that he agreed with LINDAHL that "the retirement was involuntary" (A 62).

Director of Insurance on a claim by a federal employee for a retirement annuity was contrary to the provisions of the act. The federal court may review such ruling where the agency fails "to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized." *Id.* at 172.

In this case, the MSPB hearing officer exceeded his statutory powers under Section 7701(c) by misallocating the burden of proof. By transferring the burden from the OPM to LINDAHL, the risk of an erroneous deprivation of private interests was increased. LINDAHL had to prove that he was disabled when the opinion concerning the ability to perform the job is usually in the hands of experts or of his superiors. This is especially true where, as here, the disability termination was involuntary. The risk of error is decreased where the burden of proof is on the OPM. It has more expertise and resources and it has been so designated by Congress in Section 7701(c)(1)(B) and OPM regulations in 5 C.F.R. 1201.56(a)(ii) and (d) (1980) (See A.B. 1a, 20a, 21a).

Should this Court determine that LINDAHL's application for disability retirement was voluntary, it should nevertheless hold that he is entitled to the protections of Section 7701 and 5 C.F.R. 1201.56 to avoid a gross injustice. Under the doctrine of estoppel when one person acts in reliance upon a representation by the government and has changed his position as a result of such reliance, the government is estopped by the conduct of its agents. *Wilbur Nat. Bank* v. *United States*, 294 U.S. 120, 124-5 (1935). Citizens are entitled to a minimum standard of honor and reliability in their dealings with the federal government. *Heckler* v. *Community Health Services of Crawford County*, ____ U.S. ____, 52 U.S.L.W. 4621 (1984).

In this case, the Navy notified LINDAHL that it would be discharging him within one month on September 4, 1979 because of his physical disability. LINDAHL relied on that conduct of his employer and filed a claim for disability retirement annuity the very next day on September 5, 1979 (R.I. 83). He

chose to take the Navy at its word that he was physically disabled. He chose not to contest the Navy's action because he also believed that he was unable to perform his duties because of his severe and chronic bronchitis. Instead, he applied for the disability retirement annuity in reliance on the position of the Navy (R.I. 83-84).

It would be a gross injustice to now allow the OPM to say that LINDAHL is not entitled to the protections of Section 7701, 5 C.F.R. 1201.56 and FPM 831-1 because his action was voluntary. Had he contested the Navy's discharge, he would have been entitled to this protection. OPM should be estopped from taking advantage of LINDAHL's reliance on the Navy's representations to him of his physical disability. It cannot on the one hand say that he is too physically disabled to work and on the other hand, say that he is not physically disabled enough to be entitled to the disability retirement annuity.

The MSPB violated LINDAHL's due process rights by placing the burden of proof upon him. It took the OPM out of the procedural morass. The risks were increased and it caused an incorrect deprivation of private interests.

This fundamental procedural issue is a constitutional issue that the Federal Circuit should have heard and considered. Instead, the Federal Circuit stated in its opinion that LINDAHL can only raise constitutional questions where it involves "infirmity in the legislation governing disability retirement or in the classification made in that legislation" (A 50), and that "allegation of procedural errors are . . . a matter for investigation and legislation by the Congress, not the courts." (A 55).

This decision stands in contravention to over eighty years of decisions of this Court which allow review of executive action taken in excess of the statutory provisions or are in violation of its regulations. Beginning with *McAnnulty* and up to the present, action of the executive branch in violation of constitutional or statutory rights of an individual is subject to judicial review. The finality language of Section 8347(c) does

not prohibit such review since Congress has never indicated that it has prohibited review for statutory or due process violations in this area.

Even one concurring opinion here recognizes the error of the plurality opinion when it states, "We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective" (A 70).

The plurality did extend the limitation on review to include procedural errors in violation of regulations, statutes and the Constitution. As a result, the decision contravenes the principal of judicial review of agency action and is invalid.

B. The Regulations Were Violated By OPM And Review Is Warranted.

Administration action of an executive department taken in violation of its own regulations establishing procedures for a hearing and review are invalid. *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *Service* v. *Dulles*, 354 U.S. 363, 388 (1957). The head of an executive department must comply with its own procedural regulations in discharging an employee. *Vitarelli* v. *Sexton*, 359 U.S. 535 (1959). Actions by executive officials which involve violations of regulations or the Constitution can be reviewed by the federal courts. *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Vander Molen* v. *Stetson*, 571 F.2d 617 (D.C. Cir. 1977).

LINDAHL raised the issue below that the Department of the Navy and OPM violated their regulations under FPM 831-1, S 10-10(a)(6), when it separated him (A 50). This regulation states, "The agency is required to retain an employee in an active duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement . . ." (A.B. 27a). The Navy here in-

itiated the disability separation on September 4, 1979. LINDAHL, in reliance on the agency action, filed for disability retirement annuity on September 5, 1979. The Navy separated LINDAHL on October 5, 1979. The OPM final decision was issued on December 4, 1980 (A 10-12).

Next, LINDAHL raised the issue in both the MSPB and the Federal Circuit that the MSPB incorrectly placed the burden of proof upon him instead of the OPM in violation of its regulations. 5 C.F.R. 1201.56(a) places the burden of proving that the agency's decision is supported by a preponderance of the evidence on the agency. The OPM never even appeared at the MSPB hearing. Instead, the MSPB placed the burden of proof on LINDAHL (A.B. 20a).

These actions affected the basic rights of LINDAHL to due process and were partially responsible for the denial of the disability retirement annuity. They should be reviewable to determine whether the action taken in violation of the regulation was void. The agency cannot be permitted to adopt the simplest procedures to avoid due process violations (A 54-55). To allow such administrative actions to exist without judicial review will permit the agency to ignore the regulations that it adopted to guide its action. This is contrary to all percepts of due process.

In conclusion, the finality language of Section 8347(c) cannot bar judicial review of agency action taken in violation of the Constitution, statutes or agency promulgated regulations. The courts have consistently held that Congress cannot deprive the federal courts of jurisdiction to review agency action that is in contravention of the Constitution, a federal statute, or regulation, even where there is a finality clause in the statute. *Gusik* v. *Schilder*, 340 U.S. 128, 132-133 (1950); *Schlesinger* v. *Councilmen*, 420 U.S. 738, 749 (1975); *Ostereich* v. *Selective Service Board No. 11*, 393 U.S. 233, 237 (1968). The actions of the OPM and MSPB are out of harmony with the statute and the Constitution, and the Federal Circuit should have assumed jurisdiction under its general jurisdiction powers to rule on these issues.

The Third and Eleventh circuit Court of Appeals both held that Congress may not preclude review of allegedly unconstitutional agency action involving disability retirement. *Campbell* v. *OPM*, 694 F.2d 305, 307 (3rd Cir. 1982); *Pitzak* v. *OPM*, 710 F.2d 1476 (10th Cir. 1983).

The LINDAHL decision grates against the concept of limited government that is part of the doctrine of separation of powers. Under our system, the judiciary is the branch of government with the ability and power to make the final decision on statutory and constitutional meaning. The LINDAHL case is a step in the wrong direction. It is an attempt to prevent judicial review of agency violations of the Constitution and statutory provisions. As such, it must be overruled.

II. THE COURT OF APPEALS HAS LIMITED POWER TO REVIEW MSPB DECISIONS ON ALL DISABILITY RETIREMENT CLAIMS UNDER SECTION 8347

A. The Finality Language Of Section 8347(c) Has Been Judicially And Administratively Interpreted To Allow Limited Judicial Review Of Agency Determinations Regarding Disability Retirement.

This Court has repeatedly held that there is a presumption that agency action is reviewable. Judical review of final agency action by a person who has been harmed will not be precluded in the absence of clear and convincing evidence that Congress intended to preclude such review. *Rusk* v. *Cort*, 369 U.S. 367, 379 (1962); *Leedom* v. *Kyne*, 358 U.S. 184.

The earlier positions of this Court requiring judicial review, e.g., *Stark* v. *Wickard*, 321 U.S. 288 (1944), have been reenforced by Congressional passage of the Administrative Procedure Act in 1946 (5 U.S.C. 551-706). This legislation had as its basic purpose judicial review to any person, "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. 702; *Abbot Laboratories* v. *Gardner*, 387 U.S. 136.

The basic purpose of the Act was to insure that agencies would operate efficiently and that disputes between the agency and a grievant would be resolved through the provided framework. This was intended to further the basic purpose of our constitutional government, its system of checks and balances, and to maintain or improve perception of a responsible and responsive government.

The judicial and administrative rulings on Section 8347(c)[9] have permitted limited judicial review. Section 8347(c) has been in existence since 1948, although the present Civil Service Retirement Act made disability retirement possible in 1920.

One of the initial cases on review of agency decision on retirement was *Dismuke* v. *United States*, 297 U.S. 167. The Court there held that it had jurisdicition to review decisions of the insurance commissioner on questions of law, where the administrative officer "exceeds his authority by making a determination which is arbitrary or capricious" or by "failing to follow a procedure which satisfied elementary standards of fairness and reasonableness . . ." *Id.* at 172-173.

This doctrine of limited judicial review of disability retirement claims was adopted by three important Court of Appeals cases decided in 1956, in which the *Dismuke* case was cited. *Ellmore* v. *Bruke*, 236 F.2d 734, 736 ft. 9 (D.C. Cir. 1956), *cert. denied* 352 U.S. 954 (1956); *Smith* v. *Dulles*, 236 F.2d 739, 742 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 955 (1956); and *Murphy* v. *Wilson*, 236 F.2d 737 (D.C. Cir. 1956), *cert. denied* 354 U.S. 955 (1956).

The courts since then have fairly consistently held that Section 8347(c) is not a total bar to all judicial review of agency disability retirement determinations. Instead, the courts have

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[9] Section 8347(c) states: "The Office shall determine questions of disability and dependency arising under this subchapter . . .The decisions of the Office concerning these matters are final and conclusive and are not subject to review." (A.B. 16a)

consistently interpreted Section 8347(c) as barring judicial review only of the evidentiary and medical basis of all determinations concerning disability and dependency. The courts have permitted judicial review in all disability cases "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of administrative determination." *Gaines* v. *United States*, 158 Ct.Cl. 497, 502, *cert. denied* 371 U.S. 936 (1962). This was adopted in *Scroggins* v. *United States*, 397 F.2d 295, 297 and is called the *Scroggins* rule or standard of review.[10]

These previous cases all concern questions of disability. But Section 8347(c) also applies to questions of dependency. The courts have consistently held that they are not completely precluded from reviewing agency determinations in this area. *Gentry* v. *United States*, 546 F.2d 343, 354-5 (Ct. Cl. 1976), *rehearing denied*, 551 F.2d 852 (1977); *Jenkins* v. *U.S. Civil Service Commission*, 460 F.Supp. 611 (D.C. 1978).

This Court in *United States* v. *Clark*, 445 U.S. 23, 34 (1980), specifically ruled that it had jurisdiction to review a commission determination on interpretation of a statute concerning dependency and live-in status. Of important significance is the Court's statement:

> "Because we hold that the Civil Service Retirement Act expressly allows the appellee's children to receive survivors' annuities, there is no question that the Court of Claims below had both jurisdiction to entertain their claims and authority to grant recovery. See *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976); *Eastport S.S. Corp.* v. *United States*, 178 Ct.Cl. 599, 606-607, 372 F.2d 1002, 1007-1009 (1967)."

It appears clear that the judicial interpretation of 8347(c) is that the statute does not preclude or bar judicial review. The

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[10] For numerous other citations to cases adopting the *Scroggins* rule, see *Parodi* v. *MSPB*, 690 F.2d 731, 736, and *McCard* v. *MSPB*, 702 F.2d 978, 982 (11th Cir. 1983).

same interpretation has been given to Section 8347(c) by the OPM and MSPB.

The OPM's position on Section 8347(c) in 1980 and prior thereto is that the section does not completely preclude judicial review. OPM Director Alan K. Campbell in a letter on May 4, 1980 to the Chairman of the House Committee on Post Office and Civil Service and a similar letter to the Chairman of the Senate Committee on Governmental Affairs, dated September 25, 1980 stated:

> "We believe that it is reasonable and proper to restrict expanded judicial review to involuntary disability retirements. An employee who voluntarily applies for disability retirement seeks to establish title to benefit granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination."

S.Rep. No. 1004, 96th Cong., 2d Sess., 4-5 (1980). H.R. Rep. No. 1080, 96th Cong., 2d Sess., 7-8 (1980). Both Congressional reports were lodged with this Court as Exhibits 1, 2.

In a hearing before the House Committee on November 27, 1979, the Associate Director of OPM, Gary Nelson, stated that questions of procedure and constitutional issues regarding agency rulings on disability retirement may be raised in the federal court system. See RFEHB Plan, Survivor Benefits and Fitness For Duty Exams; Hearing on H.R. 2510, H.R. 5410, S. 716 Before the Subcommittee on Post Office and Civil Service, 96th Cong., 1st Sess., 4, November 27, 1979. (See Congressional hearing report also lodged with this Court as Exhibit 3.)

In addition, the MSPB has consistently taken the position both before and after the 1980 Amendment to Section 8347(c) that the section is only a limitation and not a bar to judicial

review of commission disability retirement determinations. *Chavez* v. *OPM*, 6 MSPB 343 (1981).[11] The MSPB also stated in its decision on May 8, 1981 to LINDAHL that he has thirty days to petition the Court of Appeals or Court of Claim to review its decision (A 41). Further, MSPB regulations provide that a person adversely affected by a final order or decision of the MSPB may appeal its decision to the federal court for judicial review.[12] The jurisdiction of MSPB also includes "determination relating to disability retirement."[13]

The agency interpretation is very important. The courts are bound by the "principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."[14] *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367, 381-2 (1969). Both OPM and MSPB have construed Section 8347(c) as being a limit only on the factual determination of medical disability in disability retirement cases.

Thus, both judical construction and administrative action have interpreted Section 8347(c) as including a right to judicial review. Judicial deference must especially be given to agency interpretation that the procedural and constitutional aspects of disability retirement decisions are entitled to be reviewed.

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[11] The MSPB there states "Thus, in the Commission's (OPM's) consistent administrative practice, the 'finality clause' of subsection 8347 (c) was construed solely as a limitation upon *judicial* review of commission disability retirement determinations."

[12] 5 C.F.R. 1201.118 (1981).

[13] 5 C.F.R. 1201.3(a) (6) (1981); and 5 C.F.R. 831.1205 (1981).

[14] The MSPB filed an amicus brief in the Federal Circuit in support of LINDAHL on June 1, 1983. Its position in that court was that, "civil service retirement determinations are subject to review by the Board and the Court under the Civil Service Reform Act and that review of this case is not precluded by 5 U.S.C. Section 8347(c)". See Amicus Brief of MSPB, 28.

B. The Legislative History From 1948 To 1978 Supports The Established Judicial And Administrative Construction Of Section 8347(c).

The current finality clause of Section 8347(c) was first added to the Civil Service Retirement Act by the 1948 amendments. It was orignially codified as Section 724 and provided that the Civil Service Commission decisions would be final and conclusive. But the provisions were only applicable to survivorship benefits, since the disability retirement provisions were in a separate section of the Act.[15]

Later, former Section 724(d)(3) was recodified into former Section 2266(c) by Section 401 of the Federal Executive Pay Act of 1956. The section was then placed in the Act's administrative provisions. The only relevant legislative history as to former Section 2266(c) states that "the bill makes no change in existing general administrative provisions." S.Rep. No. 2642, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. and Ad. News, 3725, 3737. It does not appear likely that Congress would enact a provision precluding judicial review of a broad range of administrative determinations that normally would be reviewed by the courts and then state that it was not effectuating any changes.

Later, amendments to Section 2266 were not substantive in nature. In 1966, Public Law 89-554 recodified the provision and placed it into Section 8347(c). In 1978, the Civil Service Reform Act, Pub.L. No. 95-454 (1978) only replaced references to the Civil Service Commission with references to OPM or MSPB. The changes and the legislative history do not indicate congressional intent that judicial review be denied to claimants for disability retirement.

The numerous cases previously cited in which the courts have held that limited judicial review is permitted for disability retirement under Section 8347(c) or its precedessors (Sections

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[15] Section 710-11, 713.

724 and 2266) have dated back to 1956.[16] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-581; *Albemarle Paper Company* v. *Moody*, 422 U.S. 405,. 419 (1975); *NLRB* v. *Gullett Gin Company*, 340 U.S. 361 (1950). And either the recodification or the revision of a Congressional act "indicates approval of court interpretations of the statute made prior to reenactment." *Atkins* v. *United States*, 556 F.2d 1028, 1039 (Ct.Cl. 1977) *cert. denied*, 434 U.S. 1009 (1978); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948).

The 1950, 1966 and 1978 reenactments of Section 8347(c) without significant change, and the numerous revisions to the Civil Service Retirement Act since 1962 show Congressional approval and adoption of the interpretation given to it by the courts that permit limited judicial review of legal error in agency determinations for disability retirement.

Likewise, the principles of statutory constructions which recognize administrative interpretations support the position of judicial review under 8347(c). Both the OPM and MSPB have interpreted that section to permit review. Administrative construction is presumed to be correct under circumstances like those herein where Congress must be regarded as being aware of the administrative construction but, "has not sought to alter that interpretation although it has amended the statute in other respects." *United States* v. *Rutherford*, 442 U.S. 544, 554, ft. 10 (1979).

The plurality decision of the Federal Circuit took the position that Congress intended to preclude review of all disability cases since 1956 (A 48). It held the later amendments also precluded judicial review. It states that, in 1978, "In reenacting section 8347(c) without change, Congress thus provided

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[16] See *Smith* v. *Dulles*, 236 F.2d 739 and ft. 10 in this brief and accompanying text.

that the review process of Section 8347(c) ended at the MSPB level" (A 48).

This interpretation by the Federal Circuit in constructing Congressional intent is contrary to the previously mentioned cardinal principles concerning knowledge by Congress of existing administrative and judicial interpretations of a statute and adoption of those interpretations when it reenacts the statute. The result is quite incorrect—not only does this Federal Circuit fail to recognize that Congress adopted the *Scroggins* formula when it reenacted those provisions in 1966 and 1978, but the Federal Circuit goes a step further and states that Congress intended to preclude judicial review by the reenactment. The legislative history does not spell out this intent of Congress. The ruling is contrary to judicial history, legislative history, and common sense. It would mean that Congress was oblivious to twenty-four years of decisions of the courts and administrators. No such interpretation is possible.

C. The Congressional Amendment to Section 8347(c) By Pub.L. 96-500 And Its Legislative History Do Not Show A Rejection Of The Previous Judicial And Administrative Construction Of This Section.

As previously stated, there is a strong presumption that Congress in enacting any statute does not intend to prohibit all judicial review of agency action. In determining Congressional intent, the beginning point is the statutory language itself. *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982). But the Court must look beyond the specific statute involved and analyze the entire legislative scheme. First, looking to the statutory language of the amendment to Section 8347, it is seen that it provides for judicial review of involuntary disability retirement of federal employees on basis of mental condition.[17] The statutory language fails to state that other disability retirement determinations are not available. And it must be remem-

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[17] Section 8347(d) (2). (A.B. 16a)

bered that the *Scroggins* formula was the law in 1980 when Congress passed the amendment to Section 8347.

The Federal Circuit stated that the plain languge of Section 8347(d) expressly precludes review beyond the administrative process for denial of voluntary disability retirement annuity claims (A 49).

This Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 specifically held, "The mere fact some acts are made reviewable should not suffice to support an implication of exclusion as to the others. The right to review is too important to be excluded on such slender and indeterminate intent." But this is exactly what the Federal Circuit did here. It held that because Congress passed legislation in 1978 specifically providing that MSPB review was available for OPM determinations and in 1980 that mental retirement determinations of an involuntary nature are subject to judicial review, there is then an implication that voluntary disability retirement claims are excluded. This is too slender a basis to prohibit judicial review.

Looking at the language of Section 8347(c), it does not provide clear and convincing evidence that Congress intended to bar all judicial review of voluntary disability retirement determinations. Had Congress chose to do that, it could have specifically provided that it was precluding judicial review of all factual and legal questions.[18] The more rational approach is that Congress recognized that there would be continued limited review of procedural error and legal errors of statutory construction for voluntary disability retirement cases, while the amendment itself expanded judicial review of agency initiated mental disability cases to full review under Section 7703. This is supported by the legislative history.

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[18] Congress did this in 38 U.S.C. Section 211 (Veterans Benefits statute); 5 U.S.C. Section 8128 (Federal Employees Compensation); and 42 U.S.C. 1935(j) (Medicare statute) by use of the words "no other official or court of the United States shall have power or jurisdiction to review any such action. . ." 38 U.S.C. 211(a).

This legislation originated in the House Committee on Post Office and Civil Service in 1979. The House Report states that the committee intended to amend the existing provision of Section 8347 to provide for *de novo* court review of agency-filed disability retirement applications based on an employee's mental condition. This was intended to curb the widespread abuses of eliminating employees from the federal agencies by use of involuntary disability retirement for psychiatric reasons. The House Report then states:

> "While the Office of Personnel Management agrees with the committee that it is reasonable and proper to restrict *expanded* judicial review of involuntary disability retirements, OPM would restrict the judicial forum to either the Court of Claims or a United States court of appeals, rather than the district court. In addition, OPM would limit the scope of judicial review and not permit questions of medical fact to be redetermined. It is on this point that the committee strongly disagrees with OPM (Emphasis added.)

H.Rep. No. 1080, 96th Cong., 2d Sess., 3 (1979). (Exhibit 1)

The report then goes on to criticize three Court of Claim decisions[19] because the courts were not permitting a review of the factual determinations of mental disability retirement cases decided by the Civil Service Commissioner (now OPM). The Committee report concludes that the same review of these factual determinations should be made as are made under Section 7703 for discrimination cases, i.e., *de novo* review in federal courts. (Exhibit 1).

Attached to this report of the House of Representatives is the letter of Director of OPM, Alan K. Campbell, where he states that it is proper to expand judicial review to involuntary disability retirement cases under Section 7703, while continu-

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[19] *McGlasson* v. *United States*, 397 F.2d 303 (Ct.Cl. 1966); *Scroggins* v. *United States*, 397 F.2d 295; and *McFarland* v. *United States*, 517 F.2d 938 (Ct.Cl. 1975) *cert. denied* 423 U.S. 1049 (1975).

ing limited judicial review for voluntary retirement cases under Section 8347(c). In addition to the House report, there were two reported meetings of the House Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service where the topic was forced retirement/psychiatric fitness for duty exams. The first committee print indicated that the committee believed there was a lack of due process for federal employees who were discharged for mental reasons. First, at the agency level, the employee was forced to be examined by a psychiatrist without any opportunity to respond to the charges. Second, the right of an employee to appeal to the courts had been limited because the Court of Claims imposed an almost impossible burden with the *Scroggins* formula. See Forced Retirement/Psychiatric Fitness For Duty Exams before Subcommittee on Compensation and Employee Benefits of Committee on Post Office and Civil Service, House of Representatives Print No. 95-99, 95th Cong., 2d Sess., (Nov. 3, 1978) 14-16.[20] (Exhibit 4)

At the second committee meeting on the H.R. 2510, Gary Nelson, the Associate Director, Compensation Group, OPM, testifed on November 27, 1979. He stated:

> "Under the Civil Service Reform Act, OPM's disability decisions are subject to de novo hearing by the Merit System Protection Board, which reviews questions of both procedure and disability.
>
> Furthermore, if there are questions of proper procedure or constitutional issues, these questions may be raised in the Federal court system. Only the question of disability itself, which is a medical fact, is actually barred from judicial review by Section 8347(c) . . ."
>
> RFEHB Plan, Survivor Benefit and Fitness-for-Duty-Exams: Hearing on H.R. 2510, H.R. 5410, S.716 Before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., 4 (November 27, 1979). (Exhibit 3)

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[20] All Congressional reports on H.R. 2510 have been lodged with this Court by LINDAHL on July 27, 1984. (See Exhibits 1 to 4).

In the Senate Report on H.R. 2510, the Governmental Affairs Committee agreed with the substance of the amendment to allow expanded review of agency initiated disability retirements on the basis of mental competency. "The position of the committee is further reenforced by the endorsement of this position by the Office of Personnel Management as set forth later in this report." At the end of the report is the duplicate letter of OPM Director Campbell calling for expanded judicial review of agency initiated mental disability retirements and continued limited review for voluntary disability retirements. S. Rep. No. 1004, 96th Cong., 2d Sess., 4,5. The Senate bill permitted review pursuant to Section 7703 for both factual and legal errors. This was the amendment that became law as Pub.L. 96-500 in 1980.

Thus, the legislative history shows the following. First, that Congress accepted the construction of the statute given by the executive department that is charged with its enforcement. Congress amended the statute based, in part on the OPM's representation that Section 8347(c) already permitted limited judicial review of disability determinations. Second, that Congress was aware of the judicial interpretation of Section 8347(c). This is clear from the many citations in the hearings and report to the *Scroggins* cases of limited judicial review and the necessity to expand it. It intended to continue that existing remedy of limited judicial review for voluntary disability retirements based on its leaving the other portion of the statutory provisions intact.

Third, Congress intended to remedy the abuses for involuntary disability retirement by providing a review of both the factual and legal rulings under Section 7703. This is consistent with limited review under *Scroggins* and Section 8347(c) for all other disability retirements. This is the logical approach gathered by looking at the entire legislative scheme.

For section 8347(c) to have any validity, it is crucial that the distinction between questions of procedure and questions of

disability or medical fact be made, and that the finality language apply only to the latter type of questions.[21]

The Federal Circuit below again ignores these canons of construction of legislative intent to ascertain the meaning of Section 8347(c). It states that Congress did not explicitly adopt *Scroggin*. Further, it states that the legislative history is unclear, therefore it is not controlling. Finally, the court believes it must look only to the statute itself to ascertain Congressional intent.[22] This Federal Circuit failed to really understand the intent of Congress because it failed to sufficiently examine the purpose of the Congressional amendment. The reason that it chose to ignore this legislative history was because it started from a premise that was incorrect. That premise was, first, that there was no presumption of judicial review because of the statutory wording. Second, that courts should not review agency action where Congress has impliedly prohibited review.

Finally, it arrives at its decision that it lacks jurisdiction over agency determination in voluntary disability without any showing of clear and convincing evidence that Congress intended to bar judicial review of agency actions.

The LINDAHL case stands in complete opposition to the decision of the Ninth Circuit in *Parodi v. MSPB*, 690 F.2d 731. That court used a more scientific approach and detailed analysis of Congressional intent after review of the prior history of Section 8347(c) and the 1980 amendments. Its holding was to recognize that the construction of Section 8347(c) which limits judicial review rather than barring it, is more consistent with the presumption that favors judicial review of agency action. It also held that the amendment gave courts the power to review the facts in the area of involuntary retirement for mental

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[21] See Amicus Brief of Walter E. Riggs, filed by H.R. Bucholtz, Esq. in the Federal Circuit in LINDAHL below.

[22] There are certain references in the Senate and House report that states that there is no judicial review of disability retirements. However, where this is construed to mean *de novo* judicial review, it becomes much clearer.

reasons, thus expanding review. *Parodi* v. *MPSB*, 690 F.2d 731.

Other courts have also recognized that there is nothing in Section 8347(c) which shows by "clear and convincing evidence of a legislative intent that all judicial review of administrative disability determinations be barred." *McCard* v. *MSPB*, 702 F.2d 978, 981 (11th Cir. 1983); *Pitzak* v. *OPM*, 710 F.2d 1476. These courts recognize that the sole purpose of the amendment was to expand judicial review of factual finding in certain disability cases, and that cannot negatively imply that Congress intended to strip employees of *Scroggin* type review in other cases. *Turner* v. *OPM*, 707 F.2d 1499, 1503 (D.C. Cir. 1984); *Scarborough* v. *OPM*, 723 F.2d 801, 810 (11th Cir. 1984).[23]

Thus, this Federal Circuit decision is contrary to legislative intent, contrary to nearly fifty years of judicial decisions, contrary to administrative interpretations by OPM and MSPB, and contrary to the statutory construction principles enunciated by this Court. As such, the decision should be reversed.

III. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS JURISDICTION PURSUANT TO 28 U.S.C. 1295 AND SECTION 7703 TO REVIEW DECISIONS OF MSPB FOR DISABILITY RETIREMENT

A. The Language Of Section 7703 And Its Legislative History Show That The Federal Circuit Has Jurisdiction Here.

Chapter 77 of the Civil Service Reform Act was intended to control all matters within the appellate jurisdiction of the

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[23] The other decisions rejecting court jurisdiction over MSPB decisions first misread the legislative reports on Section 8347(c), and second, ignore the important distinction between review of facts and review of law in those reports and the presumption of review of agency action. *Morgan* v. *OPM*, 675 F.2d 196 (8th Cir. 1983); *Campbell* v. *OPM*, 694 F.2d 305 (3rd Cir. 1982); *Chase* v. *OPM*, 695 F.2d 790 (4th Cir. 1982); *Hackett* v. *OPM*, 721 F.2d 580 (6th Cir. 1983).

MSPB.[24] Section 7701 provides that an employee may appeal any agency action to the MSPB.[25] And the denial of disability retirement was an action that was appealable to the MSPB under Section 8347(d). Congress, by the plain language of Section 7703(b)(1), provided for judicial review of any employee aggrieved by a final order of the MSPB.[26]

The legislative history is also clear. It states that the amendment to Chapter 77 by Section 205 "makes important changes in the procedures governing review by the Board and the courts of adverse actions, such as removals, and other appealable actions taken by an agency." S.Rep. No. 969, 95th Cong., 2d Sess., 51, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2775, 2773. Likewise, the history states that Section 7703(a) (formerly section 7702(a)) "applies to judicial review of *all* final orders or decisions of the Board. . . ." *Id.* at 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News, at 2784. (Emphasis added).

The Civil Service Reform Act provided a basis for the reorganization to remedy inequities in federal employment. Congress intended to eliminate Civil Service Commission jurisdiction over appellate responsibilities in disputes over hiring, discipline, restoration rights and retirement benefits. (H.R. Rep. No. 1396, 95th Cong., 2d Sess., 10-11 (1978)). The MSPB was substituted for the Commission, including for cases arising under Section 8347(d).

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[24] Civil Service Reform Act of 1978. Pub.L. No. 95-454, 92 Stat. 1111 (1978).

[25] Section 7701 states: "(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation." (A.B. 1a-5a).

[26] Section 7703 states: "(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." (A.B. 6a-7a).

All hearing procedures for MSPB appeals were codified in Section 7701 replacing Civil Service Commission regulations. More extensive appeal rights were provided to appellants from OPM actions, including a right to hearing in disability retirement cases.

The Civil Service Reform Act also eliminated review of Commission decisions by the District Courts. Jurisdiction was transferred over all appeals originally to the Court of Appeals and the Court of Claims. This right to review was subsequently transferred to the Court of Appeals for the Federal Circuit by the Federal Courts Improvement Act of 1982.[27]

The MSPB has held in *Chavez* v. *OPM*, 6 MSPB 343 that Section 7701 applies in disability retirement cases because that section is the only source of jurisdiction for appeals.

Numerous Courts of Appeal have recognized jurisdiction to hear appeals pursuant to Section 7703 over MSPB decisions on reemployment rights,[28] reduction in force,[29] and disability retirement.[30]

Likewise, the Federal Circuit has held that the jurisdiction that the MSPB has over appeals under Section 7701 corresponds with the jurisdiction which the Federal Circuit has under Section 7703. It held all Section 7701 appeals must go to the Federal circuit. *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1982).

Section 7703 embodies the judicial presumption that agency action is subject to review. But the Federal circuit refused to

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[27] Pub.L. No. 97-164 (1982); 28 U.S.C. 1295. It provides: "(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction-. . .(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b) (1) and 7703(d) of title 5 (5 U.S.C. Section 7703(b) (1), (d))."

[28] *Raicovich* v. *U.S. Postal Service*, 675 F.2d 417 (D.C. Cir. 1982).

[29] *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982).

[30] *Turner* v. *OPM*, 707 F.2d 1499.

follow this presumption. It found to the contrary that there is no presumption and that Section 7703 does not apply. Instead, it found that Congress never intended judicial review in this area of voluntary mental disability retirement claims or physical disability retirement claims (A 48).

The courts have allowed review of agency decisions under Section 7703(c) based on the substantial evidence test. The courts reviewing agency decisions under Section 8347(c) as construed by *Scroggins* allow review of legal and procedural errors, and errors going to the heart of the administrative process. *McCard* v. *MSPB*, 702 F.2d 978; *Pitzak* v. *OPM*, 710 F.2d 1476, 1478.

This construction, and not that of the Federal Circuit appeal below overruling *Scroggins*, which limits rather than bars judicial review, is more consistent with the presumption favoring judicial review of agency determination. *Parodi* v. *MSPB*, 690 F.2d 731, 735.

But even more important, there was no clear and convincing evidence of a contrary legislative intent against judicial review as the court below ruled. The Congressional history of the Civil Service Reform Act showed that Congress provided for a grant of review of all MSPB decisions under Section 7703. It did not exclude any, except for those of discrimination. Congress gave plenary power to the Federal Circuit to review.

The purpose of Congress in enacting the Civil Service Reform Act was to preserve the merit system, to protect federal employees and their statutory rights from violation by their employer, and to protect those rights in a review process which insures consistent decisions. 5 U.S.C. 1101(5); S.Rep, No. 969, 95th Cong., 2d Sess., 32, 42, 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2728, 2740, 2774. Under this Act, the MSPB was empowered to make conclusive factual findings while the courts were to have jurisdiction over legal and procedural errors and to review the record for substantial factual errors. *Id.* at 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2784.

The Federal Circuit decision in LINDAHL frustrates Congressional intent because it prohibits judicial review of MSPB decisions of any physical disability retirement cases and any voluntary mental disability retirement cases. At present, there is no avenue of judicial relief for those persons who are unfairly treated by an agency, or who have been denied procedural or legal rights in the administrative process. The availability of judicial review is part of our system and values. Without it, there is no protection against executive abuses.

The Federal Circuit was unable to reconcile the apparent conflict between Section 7703 granting power of review and Section 8347(c)'s limiting the power of review. The plurality decision concentrated on Section 8347(c) and held it controlled over Section 7703 and barred judicial review of all voluntary disability retirement cases. It fell victim to relativism. It failed to recognize the broad authority of the Federal Circuit to review as set forth in Section 7703(a)(1). It sets itself beyond that section. Likewise, it prohibits OPM from petitioning for a review of any MSPB decision despite the express language of Section 7703(d). It slamed the courthouse door on individuals and OPM alike in Section 8347 cases involving physical disability retirement claims.

This ruling is also contrary to the rule of law of this Court that provides that "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Pitzak* v. *OPM*, 710 F.2d 1475, 1479. The anomaly created by the plurality is obviated by regarding both Section 7703(a)(1) and Section 8347(c) as effective. Both statutes are capable of coexistence. This intent of Congress is to give full review of forced mental disability retirement cases arising under Sections 7703 and 8347(d) while limited judicial review under 8347(c) in physical disability retirement cases. This will preserve the duty of the courts to require an executive agency to follow its statutory and regulatory framework.

B. The Congressional Policy In The Federal Court Improvement Act Is Frustrated By The Federal Circuit Decision.

Congress passed the Federal Courts Improvement Act in 1982. By that statute, Congress sought to obtain uniform decisions in civil service matters by placing review of all MSPB decisions, except for discrimination, in the Federal Circuit. Congress sought to eliminate "inconsistent decisions on the same issues" and to prevent different review where "courts apply the law unevenly when faced with the facts of individual cases." S.Rep. No. 275, 97th Cong., 2d Sess., 2 (1981) *reprinted in* 1982 U.S. Code Cong/ & Ad. News, 2, 3, 12, 13.

But this goal of uniformity would be undermined by the Federal circuit's decision in LINDAHL. Persons who are aggrieved would be forced to seek review of MSPB retirement decisions either in the claims court or the district courts. The Federal Circuit does not have appellate jurisdiction over district courts. Thus, uniformity would be frustrated.

Likewise, the Federal Circuit below prevents the need for consistency of decision in federal employee cases from being achieved. The effect is to foreclose a new forum that Congress intended to be utilized by federal employees. Congress gave the Federal Circuit the power and it must exercise its jurisdiction under 28 U.S.C. 1295(a)(9) and Section 7703(b)(1) to review all MSPB decisions for disability retirement. This Court should reverse LINDAHL and grant the relief requested.

IV. THE MSPB AND OPM DENIED LINDAHL HIS RIGHTS TO DUE PROCESS

A. The MSPB Violated Due Process Rights By Failing To Follow The Statutory Burden Of Proof.

In all cases before the Merit Systems Protection Board, ". . . the decision of the agency shall be sustained . . . *only* if the agency's decision . . . is supported by a preponderance of the evidence." 5 U.S.C. 7701(c)(1)(B).

The hearing before the MSPB is a *de novo* hearing. *Shannon* v. *United States Civil Service Commission*, 621 F.2d 1030, 1031 (9th Cir. 1980); *Doe* v. *Hampton*, 566 F.2d 265, 272 (D.C. Cir. 1977).[31] The hearing must not be a rubber stamp, but must concern itself with the record as a whole. *Kowal* v. *United States*, 412 F.2d 867, 870 (Ct.Cl. 1969).

Cases before the MSPB require active participation of the agency involved and justification of its decision. *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980); *Walker* v. *Washington*, 627 F.2d 541, 544 (D.C. Cir. 1980) *cert. denied* 449 U.S. 994 (1980); *Francisco* v. *Campbell*, 625 F.2d 266, 269 (9th Cir. 1980).

Although the courts will give deference to administrative policy or construction of a statute, they will not be bound by it if the administrative interpretation is clearly erroneous. *Allen* v. *United States*, 571 F.2d 14, 18 (Ct.Cl. 1978); *Hart* v. *McLucas*, 535 F.2d 516, 520 (9th Cir. 1976); *Shannon* v. *United States Civil Service Commission*, 621 F.2d 1030.

Furthermore, the legislative history of the Civil Service Reform Act of 1978 states:

> The most important part of the procedure is the way it allocates the burden of proof, and the standard of proof it adopts.
>
> *Under the provision, as amended, the agency will have the initial burden before the Board of going forward with its case. The bill, as introduced, did not put this initial burden expressly on the agency. The agency action cannot be ultimately upheld under any circumstances unless the agency first makes a prima facie case justifying its action.*

S. Rep. No. 969, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2723, 2766 (Emphasis added.)

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[31] These cases were against the Civil Service Commission which was the precursor of MSPB prior to 1978.

In the present case, the MSPB chose to ignore this legislative mandate and placed the burden of proof on LINDAHL.[8] This is clearly erroneous, and a violation of the due process rights of the petitioner. First, it is in complete disregard of the legislative mandate. Congress in its complete investigation and knowledge of abuses of employee rights by government agencies required the agency to go forward with proof to show that its decision of denying benefits to an application was proper.[9]

Second, the MSPB violated its most fundamental principle that it must objectively view evidence and not be a rubber stamp for the agency. By placing the burden on LINDAHL, and not requring the agency to make a prima facie case, it in effect granted an unfair presumption to the agency that its decision was valid. It was especially important in this hearing since the agency chose not to have a representative or present any testimony at the hearing. In fact, the entire hearing appeared as though the hearing officer was present and represented the agency. He acted in a dual role of hearing officer and representative of the agency by placing the burden of proof on LINDAHL. He never placed any requirement on the agency.

The MSPB unlawfully transferred the burden of proof to LINDAHL unduly prejudicing his due process rights. Its decision must be reversed.

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[8] The burden of proof is especially placed on the agency when it initiates the action. In this case, the facts are clear. The agency initiated the disability separation on September 4, 1979 (A 10). It was only in reliance on that action that LINDAHL filed for disability retirement on September 5, 1979 (R.I. 83). Therefore, the burden was on the agency.

[9] See Argument I regarding due process nature of burden requirement at page 13.

B. OPM And The Department Of The Navy Violated Due Process Rights Of LINDAHL By Discharging Him While His Application For Disability Was Pending.

Action taken by an administrative agency in contravention of its regulations is illegal. *Billings* v. *Truesdale*, 321 U.S. 542, 552-3 (1944).

In *Piccone* v. *United States*, 407 F.2d 866 (Ct. Cl. 1969) the Court of Claims held that a separation accomplished through violation of a controlling regulation is invalid. A naval employee was separated for disability while his appeal from denial of disability retirement was pending. He was separated in violation of Department of Navy regulations which prohibited separation for disability while an application for disability retirement was pending.

FPM Supplement 831-1, Subchapter S10-10(a)(6) states:

> The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement . . . (See A.B. 27a).

As has been previously explained, the agency here initiated the disability separation on September 4, 1979 (A 10).

Thus, the burden was on the Department of the Navy and the OPM to retain LINDAHL after the retirement claim was filed. It refused to do so. Instead, it chose to ignore its own regulations and process LINDAHL for disability-separation.

At the time of the separation it knew that LINDAHL met all of the requirements of S10-10(a) because he had completed five years of service, was totally disabled for useful service in his position, and the disability was not caused by LINDAHL's own misconduct or habits.

The Chief of Police, the Head of Security, and the Captain of the police all testified that in August and September 1979 they knew that there was no place in the security department at Mare Island for LINDAHL. He could not perform his duties due to his medical problems (R.II. 38, 40, 49, 53, 55, 61, 70-74).

The Federal circuit below refused to consider these due process violations by the agency. Instead, it chose to state that it did not have jurisdiction.

This Court should decide this issue and order a new hearing by the MSPB with the burden on OPM and award back pay to LINDAHL from October 5, 1979 to December 4, 1980 for violation of FPM Supp 831-1.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

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WAYNE LINDAHL

APPENDIX

APPENDIX

5 U.S.C. 7701

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently.

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice,

including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding calendar year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) The Board may prescribe regulations to carry out the purpose of this section.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 530; Pub.L. 95-454, Title II, § 205, Oct. 13, 1978, 92 Stat. 1138; Pub.L. 96-54, § 2(a)(45), Aug. 14, 1979, 93 Stat. 384.

5 U.S.C. 7703

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701. In review of a final order or decision issued under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (h)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(As amended Pub.L. 97-164, Title I, § 144, Apr. 2, 1982, 96 Stat. 45.)

5 U.S.C. 8334

§ 8834. Deductions, contributions, and deposits

(a)(1) The employing agency shall deduct and withhold 7 percent of the basic pay of an employee, 7½ percent of the basic pay of a Congressional employee, a law enforcement officer, and a firefighter, and 8 percent of the basic pay of a Member. An equal amount shall be contributed from the appropriation or fund used to pay the employee or, in the case of an elected official, from an appropriation or fund available for payment of other salaries of the same office or establishment. When an employee in the legislative branch is paid by the Clerk of the House of Representatives, the Clerk may pay from the contingent fund of the House the contribution that otherwise would be contributed from the appropriation or fund used to pay the employee.

(2) The amounts so deducted and withheld, together with the amounts so contributed, shall be deposited in the Treasury of the United States to the credit of the Fund under such procedures as the Comptroller General of the United States may prescribe. Deposits made by an employee or Member also shall be credited to the Fund.

(b) Each employee or Member is deemed to consent and agree to these deductions from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or Member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment, except the right to the benefits to which the employee or Member is entitled under this subchapter.

(c) Each employee or Member credited with civilian service after July 31, 1920, for which retirement deductions or deposits have not been made, may deposit with interest an amount equal to the following percentages of his basic pay received for that service:

	Percentage of basic pay	Service period
Employee	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7	After December 31, 1969.
Member or employee for Congressional employee service	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7½	After December 31, 1969.
Member for Member service	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to August 1, 1946.
	6	August 2, 1946, to October 31, 1956.
	7½	November 1, 1956, to December 31, 1969.
	8	After December 31, 1969.
Law enforcement officer for law enforcement service and firefighter for firefighter service	2½	August 1, 1920, to June 30, 1926.
	3½	July 1, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7	January 1, 1970, to December 31, 1974.
	7½	After December 31, 1974.

	Percentage of basic pay	Service period
Bankruptcy judge	2½	August 1, 1920, to June 30, 1926.
	3½	July 3, 1926, to June 30, 1942.
	5	July 1, 1942, to June 30, 1948.
	6	July 1, 1948, to October 31, 1956.
	6½	November 1, 1956, to December 31, 1969.
	7	After January 1, 1970.

(d) Each employee or Member who has received a refund of retirement deductions under this or any other retirement system established for employees of the Government covering service for which he may be allowed credit under this subchapter may deposit the amount received, with interest. Credit may not be allowed for the service covered by the refund until the deposit is made.

(e) Interest under subsection (c) or (d) of this section is computed from the mid-point of each service period included in the computation, or from the date refund was paid, to the date of deposit or commencing date of annuity, whichever is earlier. The interest is computed at the rate of 4 percent a year to December 31, 1947, and 3 percent a year thereafter compounded annually. The deposit may be made in one or more installments. Interest may not be charged for a period of separation from the service which began before October 1, 1956.

(f) Under such regulations as the Office of Personnel Management may prescribe, amounts deducted under subsection (a) of this section and deposited under subsections (c) and (d) of this section shall be entered on individual retirement records.

(g) Deposit may not be required for—

(1) service before August 1, 1920;

(2) military service;

(3) service for the Panama Railroad Company before January 1, 1924;

(4) service performed before January 1, 1950, by natives of the Pribilof Islands in the taking and curing of fur seal skins and other activities in connection with the administration of the Pribilof Islands;

(5) days of unused sick leave credited under section 8339(m) of this title; or

(6) any period for which credit is allowed under section 8332(l) of this title.

(h) For the purpose of survivor annuity, deposits authorized by subsections (c) and (d) of this section may also be made by the survivor of an employee or Member.

5 U.S.C. 8337

§ 8337. Disability retirement

(a) An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency. A Member who completes 5 years of Member service and is found by the Office to have become disabled shall be retired on his own application. An annuity authorized by this section is computed under section 8339 of this title.

(b) A claim may be allowed under this section only if the application is filed with the Office before the employee or Member is separated from the service or within 1 year thereafter. This time limitation may be waived by the Office for an employee or Member who at the date of separation from service or within 1 year thereafter is mentally incompetent, if the application is filed with the Office within 1 year from the date of restoration of the employee or Member to competency or the appointment of a fiduciary, whichever is earlier.

(c) An annuitant receiving disability retirement annuity from the Fund shall be examined under the direction of the Office—

(1) at the end of 1 year from the date of the disability retirement; and

(2) annually thereafter until he becomes 60 years of age;

unless his disability is permanent in character. If the annuitant fails to submit to examination as required by this section, payment of the annuity shall be suspended until continuance of the disability is satisfactorily established.

(d) If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical

examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 1 year after the end of the calendar year in which earning capacity is so restored, whichever is earlier. Earning capacity is deemed restored if in each of 2 succeeding calendar years the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

(e) If an annuitant whose annuity is terminated under subsection (d) of this section is not reemployed in a position in which he is subject to this subchapter, he is deemed, except for service credit, to have been involuntarily separated from the service for the purpose of this subchapter as of the date of termination of the disability annuity, and after that termination is entitled to annuity under the applicable provisions of this subchapter. If an annuitant whose annuity is heretofore or hereafter terminated because of an earning capacity provision of this subchapter or an earlier statute—

(1) is not reemployed in a position in which he is subject to this subchapter; and

(2) has not recovered from the disability for which he was retired;

his annuity shall be restored at the same rate effective the first of the year following any calendar year in which his income from wages or self-employment or both is less than 80 percent of the current rate of pay of the position occupied immediately before retirement. If an annuitant whose annuity is heretofore or hereafter terminated because of a medical finding that he has recovered from disability is not reemployed in a position in which he is subject to this subchapter, his annuity shall be restored at the same rate effective from the date of medical examination showing a recurrence of the disability. The second

and third sentences of this subsection do not apply to an individual who has become 62 years of age and is receiving or is eligible to receive annuity under the first sentence of this subsection.

(f) An individual is not entitled to receive an annuity under this subchapter and compensation for injury or disability to himself under subchapter I of chapter 81 of this title covering the same period of time. This provision does not bar the right of a claimant to the greater benefit conferred by either subchapter for any part of the same period of time. Neither this provision nor any provision of subchapter I of chapter 81 of this title denies to an individual an annuity accruing to him under this subchapter on account of service performed by him, or denies any concurrent benefit to him under subchapter I of chapter 81 of this title on account of the death of another individual.

(g) The right of an individual entitled to an annuity under this subchapter is not affected because he has received a lump-sum payment for compensation under section 8135 of this title. However, if the annuity is payable on account of the same disabiltiy for which compensation under section 8135 of this title has been paid, so much of the compensation as has been paid for a period extended beyond the date the annuity becomes effective, as determined by the Department of Labor, shall be refunded to that Department to be covered into the Employees' Compensation Fund. Before the individual may receive the annuity he shall—

(1) refund to the Department of Labor the amount representing the commuted compensation payments for the extended period; or

(2) authorize the deduction of that amount from the annuity payable to him under this subchapter, which amount shall be transmitted to the Department of Labor for reimbursement to the Employees' Compensation Fund.

Deductions from the annuity may be made from accrued and accruing payments. When the Department of Labor finds that the financial circumstances of the annuitant warrant deferred refunding, deductions from the annuity may be prorated against and paid from accruing payments in such manner as that Department determines. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 572; Pub.L. 90-83, § 1(76), Sept. 11, 1967, 81 Stat. 214; Pub.L. 95-454, Title IX, § 906(a)(2), (3), Oct. 13, 1978, 92 Stat. 1224.

5 U.S.C. 8347

§ 8347. Administration; regulations

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

(b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

(e) The Office shall fix the fees for examinations made under this subchapter by physicians or surgeons who are not medical officers of the United States. The fees and reasonable traveling and other expenses incurred in connection with the examinations are paid from appropriations for the cost of administering this subchapter.

(f) The Office shall select three actuaries, to be known as the Board of Actuaries of the Civil Service Retirement System. The Office shall fix the pay of the members of the Board, except members otherwise in the employ of the United States. The Board shall report annually on the actuarial status of the System and furnish its advice and opinion on matters referred to it by the Office. The Board may recommend to the Office and to Congress such changes as in the Board's judgment are necessary to protect the public interest and maintain the System on a sound financial basis. The office shall keep, or cause to be kept, such records as it considers necessary for making periodic actuarial valuations of the System. The Board shall make actuarial valuations every 5 years, or more often if considered necessary by the Office.

(g) The Office may exclude from the operation of this subchapter an employee or group of employees in or under an Executive agency whose unemployment is temporary or intermittent. However, the Office may not exclude any employee who occupies a position on a part-time career employment basis (as defined in section 3401(2) of this title).

(h) The Office, on recommendation by the Mayor of the District of Columbia, may exclude from the operation of this subchapter an individual or group of individuals employed by the government of the District of Columbia whose employment is temporary or intermittent.

(i) The Architect of the Capitol may exclude from the operation of this subchapter an employee under the Office of the Architect of the Capitol whose employment is temporary or of uncertain duration.

(j) The Librarian of Congress may exclude from the operation of this subchapter an employee under the Library of Congress whose employment is temporary or of uncertain duration.

(k) The Secretary of Agriculture shall prescribe regulations to effect the application and operation of this subchapter to an individual named by section 8331(1)(F) of this title.

(l) The Director or Acting Director of the Botanic Garden may exclude from the operation of this subchapter an employee under the Botanic Garden whose employment is temporary or of uncertain duration.

(m) Notwithstanding any other provision of law, for the purpose of ensuring the accuracy of information used in the administration of this chapter, at the request of the Director of the Office of Personnel Management—

(1) the Secretary of Defense or the Secretary's designee shall provide information on retired or retainer pay provided under title 10;

(2) the Administrator of Veterans Affairs shall provide information on pensions or compensation provided under title 38;

(3) the Secretary of Health and Human Services or the Secretary's designee shall provide information contained in the records of the Social Security Administration; and

(4) the Secretary of Labor or the Secretary's designee shall provide information on benefits paid under subchapter I of chapter 81 of this title.

The Director shall request only such information as the Director determines is necessary. The Director, in consultation with the officials from whom information is requested, shall establish, by regulation and otherwise, such safeguards as are necessary to ensure that information made available under this subsection is used only for the purpose authorized.

28 U.S.C. 1295

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5 [5 U.S.C. § 7703(b)(1), (d)];

5 C.F.R. 1201.56

§ 1201.56. Burden and degree of proof, affirmative defenses.

(a) *Burden and degree of proof.* (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the Board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

(c) *Definitions.* For purposes of this section, the following definitions shall apply:

(1) *Substantial evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true.

(2) *Preponderance of the evidence:* That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

(3) *Harmful error;* Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

(d) *Moving forward.* In cases where action has been taken against an employee by the agency, the agency shall present its case first. The appellant may then present evidence.

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S10-10. Filed-by-agency disability retirement procedures

a. Procedural responsibilities of agency when it considers acting upon deficiencies in an employee's service caused by a possible health problem. (1) *Procedures.* An agency should follow the procedures prescribed by the regulations if the deficiencies in an employee's service, conduct, or attendance are such that removal may be necessary to promote the efficiency of the service, or if the employee's behavior or physical condition is such that it presents a significant disruptive influence or risk to the safety of others in the work environment. These procedures are of two types: those that are *required* and those that are *recommended* as good personnel practices. The required prodecures must be observed in every case. The Civil Service Commission will remand to agencies without action any agency-filed disability retirement case which indicates lack of conformance with required procedures. Failure of an agency to follow recommended procedures will not be cause for remanding or, in itself, a basis for denial of the application. An employee has the right to be represented at any time during these procedures. Hereafter in this section, the word *employee* includes the concept of representative where appropriate, and all rights, notices, etc., are available to representatives.

(2) *Making preliminary decision*

(a) The agency is required to make a preliminary determination that the employee's performance, attendance, or behavior is below the level of acceptability, and on the basis of management evidence, that a health problem exists which could account for the service deficiencies. Management evidence means information obtained from such readily available sources as supervisory observation of job performance, absence from duty, or knowledge of illness, accident, or hospitalization.

(b) It is recommended that supervisors and personnel officials consult informally with the agency medical officer

to explore possible medical solutions to the employee's problems.

(3) *Establishing a prima facie case.* The agency is required to establish a prima facie case in *record* evidence that (a) the employee's service is not useful and efficient (based on performance, attendance, behavior, etc.) and (b) the apparent cause is a mental or physical illness or injury not of a transient nature. The prima facie case will document primarily deficiencies in the employee's service rather than his or her alleged illness or injury. Except where an issue of safety of life or property or an issue of security clearance can be decided only upon the basis of the state of physical or mental health of the employee, to be sufficient, the available evidence should be such that it will warrant consideration of the employee's removal from the service under adverse action procedures if medical findings do not support disability retirement.

(4) *Conducting a counseling session*

(a) It is recommended that, if possible, the agency have a counseling session with the employee to discuss the problem and to inform the employee thoroughly of the advantages and disadvantages of the various alternatives open to him or her before any formal action is initiated. A transcript need not be made of this session. If a counseling session is not held, the reasons should be given in the record. One of the primary purposes of the counseling session is to explore with the employee the possibiltiy of reassignment to another position. An agency should make a conscientious search and should consider the employee's potential value for retraining for a different type of work.

(b) The agencies are reminded that executive branch policy encourages maximum use of the services of the agency coordinators for the employment of the handicapped. Instructions pertaining to reassignment in lieu of disability retirement appear in FPM chapter 306, subchapter 8. The coordinator will also be able to provide information on vocational rehabilitation made available

through the counselors from the various State agencies. The counselor from the State vocational rehabilitation agency can be useful to the employee and the agency in selective placement efforts because of his or her knowledge of disabilities and job requirements, and can make recommendations regarding vocational rehabilitation services. The agency may assist an employee in availing him or herself of the services offered by a vocational rehabilitation agency, but this assistance has no effect on any action taken under instructions in this supplement or related instructions appearing elsewhere in the FEDERAL PERSONNEL MANUAL.

(c) The agency should not overlook the possibilities of transfer of the employee to a position in another agency. An employee's failure to choose reassignment at this time should *not* be considered final. Offers should be held open, if possible, and any other opportunities that arise before the employee's separation should be explored.

(5) *Obtaining medical evidence*

(a) If the counseling session has not made an alternative course of action possible, the agency may direct the employee to report for a fitness for duty examination as instructed by the following paragraphs. If evidence already available is apparently sufficient (preferably in the judgment of a medical officer, particularly when a possible mental illness is indicated) to establish that the deficiencies in the employee's service are caused by disease or injury, such an examination would be unnecessary.

(b) When the agency has decided that available medical evidence is apparently inadequate, the employee's supervisor or other manager familiar with the employee's performance on the job must decide, with the assistance of any available medical advice, whether the possible health problem(s) affecting the employee's service can be evaluated by a general physical examination, an examination by

a specialist in a physical disorder, or a psychiatric examination. If a general physical examination or an examination by a specialist in a physical disorder is indicated, the agency may order an appropriate fitness-for-duty examination, as follows:

(i) A written notice must be prepared to order the employee to report for the examination. This notice must inform the employee of the reasons for the examination. This notice must also provide instructions to the employee on how to participate in the selection of a medical examiner if he or she desires to do so. An employee has the right to be represented, and should be so informed by this notice (see (c)(ii)*1* below).

(ii) If an employee objects to being examined and is unwilling to select a different medical examiner, the agency may consider bringing charges against the employee which may *include* a charge of refusing to report for an examination as directed.

(iii) When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner named by the agency to serve as background for his examination. Any information presented to the medical examiner is also made available to the employee or a physician designated by the employee in writing for this purpose.

(iv) The medical examiner will be asked to state his or her opinion on whether the employee should be given further testing or examination. Further examination may not be ordered unless recommended by the medical examiner.

(c) If the employee's supervisor or other manager familiar with the employee's performance on the job decides that the behavior of the employee has been such as to raise the possibiltiy that the illness is mental or emotional,

and recommends a psychiatric examination, or if a physical examination was made and the medical examiner recommends a psychiatric examination:

(i) An employee may not be ordered to report for a psychiatric examination unless a majority of a panel of at least three agency officials agree that the circumstances warrant such action.

(ii) If a majority of the agency panel agrees that a psychiatric examination is indicated, such an examination will be ordered as follows:

1 If a psychiatric examination is to be ordered, appointment of a representative is required. An employee may name a representative at any time, but if he or she fails to name one voluntarily, the agency should urge the employee to do so before ordering a fitness-for-duty psychiatric examination and offer him or her assistance by naming the kinds of persons who make good representatives. If the employee does not name a representative at the agency's urging, the agency must appoint a representative who will receive copies of all notices, determinations, decisions, or other written communications issued to the employee under these procedures.

2 A written notice to the employee must be prepared to order the examination as above.

3 If the employee objects to the medical examiner named by the agency, he or she will be asked to submit the names of three to five board-certified psychiatrists to whom the employee would be willing to report. The agency will then select a medical examiner from the list and arrange an examination.

4 When a medical examiner is selected and an examination scheduled, all available information pertinent to the employee's possible health problem is presented to the medical examiner to serve as back-

ground for his or her examination. The agency will make available only to a licensed physician, designated in writing for that purpose by the employee or his or her representative, a full report of the medical evidence in his or her file including a copy of the reported behavior irregularities or manifestations of unsatisfactory service.

5 If the employee refuses to cooperate altogether, the agency must document all instances of alleged behavioral deficiencies on which the decision to order a psychiatric examination was based. This lay evidence may serve as the basis for an agency-filed application for disability retirement in the case of an emotionally disturbed employee.

(d) If the agency selects a representative, it may choose a family member, union officer, veteran's service officer, or if no other representative is available, an employee of the agency. An employee should be chosen as representative only as a last resort and should not be an employee under the jurisdiction of the supervisor initiating the request for disability retirement. An ideal agency panel to consider whether a psychiatric examination should be ordered would include an immediate *supervisor or manager, a personnel official, and an agency medical officer if one is available,* but other officials may be used when necessary. Members of such a panel do not have to actually hold a meeting to reach a decision on the file.

(6) *Duty status.* The agency is required to retain an employee in an active-duty status pending decision of the Office of Personnel Management, Compensation Group on an agency application for disability retirement, except that the agency on the basis of medical evidence may place an employee on leave with his or her consent, or without consent when the circumstances are such that retention in an active-duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the

employee, fellow workers, or the general public. If the leave account of the employee is or becomes exhausted, any suspension or involuntary leave without pay must be effected in accordance with applicable laws, Executive Orders, and regulations.

(7) *Making tentative determination.* On the basis of all available evidence, the agency is required to decide whether deficiencies in the employee's service are caused by illness or injury. If not, adverse action procedures may be instituted if warranted. If the agency decides that deficiencies in the employee's service (performance, attendance, behavior, etc.) are established and are caused by disease or injury, it then must notify the employee of this tentative determination that he or she meets all requirements to be retired for disability. The notice must:

(a) Be in writing;

(b) Give reasons for tentative determinations;[1]

(c) Include an explanation of the employee's right to reply orally, or in writing, or both, and to submit affidavits or documentary evidence or both, within a specific reasonable time, but no less than 15 calendar days; instructions for submitting a reply; and an explanation of the right to representation, if a representative has not already been designated;

(d) Advise the employee of the right (or that of his or her physician or representative, or both) to review the case file and to obtain copies of the medical findings at no expense; and

(e) Name the official designated to receive employee's oral reply.

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No. 83-5954

In the Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit has jurisdiction under 28 U.S.C. 1295(a)(9) to entertain a direct appeal from a decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of an application for civil service retirement benefits.

2. Whether, if the court of appeals has jurisdiction under 28 U.S.C. 1295(a)(9) to review MSPB decisions in civil service retirement cases generally, judicial review nevertheless was barred in this case by 5 U.S.C. 8347(c), which provides that OPM's decisions on questions of disability arising under the civil service retirement laws "are final and conclusive and are not subject to review," except for review by the MSPB.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-5954

WAYNE LINDAHL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 45-85) is reported at 718 F.2d 391. The opinion of the Merit Systems Protection Board (J.A. 28-41) and the decisions of the Office of Personnel Management (J.A. 21-22, 25-27) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 15, 1983, and was granted on June 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 5 U.S.C. 7701, 7703 and 8347, and 28 U.S.C. 1295(a)(9), are reproduced at Pet. Br. App. 1a-7a, 16a-19a.

STATEMENT

1. On September 4, 1979, the Department of the Navy notified petitioner that it proposed to separate him from his civilian position as a police officer at the Naval Sup-

port Activity at Mare Island in Vallejo, California, because of his physical inability to perform the duties of his position (J.A. 10-12). The notice relied upon a report from petitioner's personal physician stating that petitioner had recurrent attacks of bronchitis and exhibited irritation of his bronchial tree when subjected to pollutants that were in the atmosphere at the Support Activity; that he was incapable of working there; and that he should not work overtime or engage in heavy exertion (J.A. 9, 10-11). The notice further explained that a medical officer had reviewed petitioner's physical qualifications and determined that he could not be assigned to the full range of duties required of a police officer at the installation (J.A. 11). Petitioner was afforded 10 days within which to respond to the advance notice of proposed separation, but failed to do so (J.A. 11-12, 14). Accordingly, by letter dated September 17, 1979, the Department of the Navy notified petitioner that, effective October 5, 1979, he would be removed from his position (J.A. 13-14). The letter advised petitioner that he could challenge his removal by filing an appeal with the Merit Systems Protection Board (MSPB) (J.A. 15), but there is no indication that petitioner ever filed such an appeal.

2. On October 9, 1979, petitioner formally filed an application with the Office of Personnel Management (OPM) for civil service disability retirement benefits (J.A. 17-19).[1] By letter dated April 8, 1980, OPM denied petitioner's application. OPM explained that the evidence failed to establish that he had a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of his position as a police officer and that the retirement statute does not authorize the payment of benefits on the basis of a partial disability

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[1] On September 5, 1979, petitioner submitted a physician's statement to the Department of the Navy on a form that is used to accompany an application for retirement benefits (1 MSPB Rec. 83-84), but he did not file an application with OPM, as required by 5 C.F.R. 831.104 (1979).

(J.A. 21).[2] OPM reaffirmed that determination on reconsideration (J.A. 25-27), stating that although petitioner had subjective symptoms, there were "very few objective findings to uphold the symptomatology" (J.A. 26). OPM also noted that petitioner had poor conditioning because he was overweight and engaged in little physical activity and that his pulmonary function tests were normal (J.A. 26). Because of the absence of clinical findings to document a physical impairment incompatible with the retention of his duties, OPM could not find the requisite "sustained condition of total disablement for [the] position held" (J.A. 27).

3. Petitioner appealed OPM's reconsideration decision to the MSPB on January 9, 1981 (J.A. 28). That appeal was taken pursuant to 5 U.S.C. 8347(d)(1), which permits appeals to the MSPB from OPM decisions denying applications for civil service retirement benefits. After conducting a hearing, the MSPB presiding official affirmed OPM's denial of benefits (J.A. 28-41).

a. The presiding official first explained that an employee who files an application for disability retirement benefits has the burden of proving his entitlement (J.A. 29-31). The presiding official acknowledged that when an employee appeals to the MSPB from an adverse agency action based on misconduct or unacceptable performance, the applicable statutory and regulatory provisions (5 U.S.C. 7701(c)(1)(B); 5 C.F.R. 1201.56(a)(iii)(1980))

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[2] At the time petitioner filed his application, the term "disability" was defined under the civil service retirement laws to mean disability "for useful and efficient service in the grade or class of position last occupied by the employee * * * because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled" (5 U.S.C. (1976 ed.) 8331(6)). In Section 403 of the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2605-2606, Congress repealed this provision and enacted a new definition of disability. See 5 U.S.C. 8337(a). H.R. Rep. 96-1167, 96th Cong., 2d Sess. 206 (1980); H.R. Conf. Rep. 96-1479, 96th Cong., 2d Sess. 118-119 (1980).

place the burden of proof on the agency to establish the correctness of its decision. However, the presiding official concluded that, in enacting the burden of proof provision in the Civil Service Reform Act of 1978 (Pub. L. No. 95-454, § 205, 92 Stat. 1128), Congress was concerned only with such adverse actions and not with disability retirement appeals. J.A. 30.

b. The presiding official also rejected petitioner's contention that his separation from his position by the Naval Support Activity established his entitlement to disability retirement benefits, explaining that the MSPB "has repeatedly made clear that a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled * * * so as to be eligible for a disability annuity under 5 U.S.C. 8337 from OPM" (J.A. 34). The presiding official observed that the Support Activity's decision to separate petitioner was based on reports by his personal physician that petitioner could not perform the full range of his duties, and that petitioner's supervisors did not rely on their own observations in concluding that petitioner was unable to perform his duties (J.A. 33-34).

c. Turning to the merits, the presiding official, after reviewing the reports of the various physicians who had examined petitioner, affirmed OPM's denial of disability retirement benefits (J.A. 31-40). The presiding official observed that the only reports that were completely supportive of petitioner were from Dr. Allen, petitioner's personal physician (J.A. 34). The presiding official found these reports unpersuasive for several reasons. First, he noted that although Dr. Allen had stated that petitioner had uncontrollable coughs (J.A. 34), the "record disclose[d] a definite lack of evidence" that petitioner's co-workers and supervisors had observed such symptoms —a factor the presiding official deemed significant because those persons regularly were in petitioner's presence during duty hours (J.A. 33, 39). Second, the pre-

siding official noted that a number of physical findings based on chest x-rays and other tests that were submitted with Dr. Allen's reports did not indicate substantially abnormal conditions (J.A. 34-35).

The presiding official also discussed the findings of Drs. Epstein and Levine, two other physicians who had examined petitioner. Dr. Epstein concluded, after reciting the results of his examination of petitioner's chest and lungs in February 1980, that there was "no evidence of either restrictive or obstructive disease" and that petitioner's condition was essentially a "chronic type of sensitivity bronchitis superimposed on a basically anxious personality type" (J.A. 36, 37). In light of the lack of evidence that others had observed symptoms, the presiding official held that Dr. Epstein's conclusions, which were supported by appropriate medical findings, were entitled to more weight than those of Dr. Allen (J.A. 39). Moreover, Dr. Epstein's conclusions were reinforced by those of Dr. Levine, who found that petitioner did not have "any disability relating to his physical conditioning" and "certainly [did] not have any pulmonary physiological disability" (J.A. 39). Against this background, the presiding official held that petitioner had not established by a preponderance of the evidence that he was totally disabled (J.A. 40).

4. Petitioner filed a petition for review of the MSPB decision in the United States Court of Claims on June 10, 1981 (J.A. 42-44). On October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (FCIA) (Pub. L. No. 97-164, 96 Stat. 25 *et seq.*), the Court of Claims was abolished and the instant case was transferred to the docket of the newly established United States Court of Appeals for the Federal Circuit (J.A. 45). The court of appeals, sitting en banc, then granted the government's motion to dismiss the appeal, concluding that judicial review of decisions by OPM and the MSPB

on questions of disability in civil service retirement cases is barred by 5 U.S.C. 8347(c) (see J.A. 46-60).[3]

Section 8347(c) provides that OPM's decisions concerning questions of disability and dependency under the civil service retirement program "are final and conclusive and are not subject to review," except for the administrative review by the MSPB that is expressly authorized by 5 U.S.C. 8347(c) and (d). The court of appeals found it "difficult to conceive of a more clear-cut statement of congressional intent to preclude review" (J.A. 47). The court also noted that Congress in 1980 had enacted a single narrow exception to this preclusion of review. 5 U.S.C. 8347(d)(2) allows an employee to obtain judicial review in the Federal Circuit pursuant to 5 U.S.C. 7703 if the MSPB finds him disabled on the basis of his mental condition in a case in which the agency, rather than the employee, has filed the application for disability retirement benefits. In the court's view, this exception provided compelling evidence that Congress intended to foreclose a right of judicial review on questions of disability in all other cases. Because petitioner did not fall within this limited exception, the court held that judicial review was not available (J.A. 48-50).

The court of appeals recognized that its predecessor, the Court of Claims, had held in *Scroggins* v. *United States*, 397 F.2d 295, cert. denied, 393 U.S. 952 (1968), and other decisions ~~brought~~ under the Tucker Act (28

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[3] Because the court dismissed the appeal on this ground, it did not address the government's contention that the court of appeals did not have subject matter jurisdiction over the case under 28 U.S.C. 1295(a)(9) (J.A. 46). The government had argued that 5 U.S.C. 7703 and 28 U.S.C. 1295(a)(9), which provide for a direct appeal to the Federal Circuit from MSPB decisions in adverse action and similar cases, do not confer jurisdiction on the Federal Circuit to review MSPB decisions in civil service retirement cases, and that petitioner's suit to recover a retirement annuity therefore could be brought only in the Claims Court under the Tucker Act, 28 U.S.C. 1491 (Gov't Mot. to Dismiss 2-12).

U.S.C. 1491) that, notwithstanding the finality clause in 5 U.S.C. 8347(c), the Court of Claims could set aside a Civil Service Commission decision on a question of disability where there had "been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination" (J.A. 50-51, quoting 397 F.2d at 297). The court explained, however, that those decisions dealt with retirement that was forced by the agency, rather than a voluntary application for retirement by the employee, as in this case (J.A. 51-52). The court further explained that if *Scroggins* and its Court of Claims progeny were read to hold that 5 U.S.C. 8347(c) leaves room for judicial review of voluntary disability retirement claims, those decisions "to that extent would have to be viewed as wrongly decided and overruled" (J.A. 52). In the court's view, to hold that MSPB decisions on disability questions generally are subject to judicial review pursuant to 5 U.S.C. 7703 "would be to render superfluous" Congress's action in enacting 5 U.S.C. 8347(d)(2) in 1980 (J.A. 58).

Judge Nichols filed a concurring opinion (J.A. 61-70). He stressed that in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982), this Court had reversed a Court of Claims decision that had employed the rationale of *Scroggins* to permit review of a claim for benefits under Part B of the Medicare Program, notwithstanding Congress's preclusion of review of the amount of benefits under Part B (see *Erika, Inc.* v. *United States*, 634 F.2d 580, 587 (Ct. Cl. 1980)). Judge Nichols reasoned that this Court's decision in *Erika* indicated that the express bar in 5 U.S.C. 8347(c) to judicial review of MSPB decisions on questions of disability likewise could not be avoided under the *Scroggins* rationale permitting review of legal or procedural, but not factual, issues (J.A. 66-68).

Judge Nies also filed a concurring opinion (J.A. 71). She was of the view that all judicial review on questions of disability is "clearly precluded" by 5 U.S.C. 8347(c)

and, in addition, that no aspect of a decision denying an application for retirement benefits could be reviewed directly in the Federal Circuit pursuant to 5 U.S.C. 7703, except in involuntary mental disability retirement cases covered by 5 U.S.C. 8347(d)(2) (J.A. 71).

Four judges dissented, concluding that review of voluntary disability retirement claims should be available under the *Scroggins* formula notwithstanding the preclusion of review in 5 U.S.C. 8347(c) (J.A. 72-85).

SUMMARY OF ARGUMENT

I

The United States Court of Appeals for the Federal Circuit does not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain direct appeals from Merit Systems Protection Board decisions in civil service retirement cases. As relevant here, 28 U.S.C. 1295(a)(9) provides that the Federal Circuit shall have jurisdiction of certain appeals from final decisions of the MSPB pursuant to 5 U.S.C. 7703(b)(1). Section 7703(b)(1) was enacted in the Civil Service Reform Act of 1978 as part of a comprehensive revision of the procedures for administrative and judicial review of adverse actions and similar personnel measures taken by an agency against an employee on the ground of misconduct or substandard performance. It was settled prior to enactment of the Civil Service Reform Act that the hearing and appeal rights applicable to adverse actions did not apply to retirement cases, and there is no indication that Congress intended to alter that arrangement in the 1978 legislation. Claims for retirement benefits instead must be brought under the Tucker Act in the Claims Court or a district court.

A number of factors support this conclusion. First, in 1980, Congress expressly authorized judicial review pursuant to 5 U.S.C. 7703 in one narrow category of retirement cases: those in which the MSPB, acting on an

agency-filed application, finds an employee to be disabled based on his mental condition. 5 U.S.C. 8347(d)(2). This makes clear that when Congress has intended retirement cases to be covered by 5 U.S.C. 7703(b)(1), it has expressly so provided. Second, the language of 5 U.S.C. 7703 indicates that it was not designed to permit applicants for retirement benefits to obtain direct review in the court of appeals. Under 5 U.S.C. 7703(a), only an "employee or applicant for employment" is granted a right of judicial review. By contrast, the category of individuals whose rights are affected by the retirement program is far broader and includes many persons—*e.g.*, Members of Congress, former employees, annuitants and survivors—who are neither employees nor applicants for employment. Third, the procedures in 5 U.S.C. 7701 governing administrative appeals to the MSPB of adverse actions and other personnel measures, which must be read in conjunction with 5 U.S.C. 7703(b)(1), are clearly inapplicable to retirement cases. Finally, the legislative history of the Civil Service Reform Act discusses 5 U.S.C. 7703(b)(1) only in connection with personnel actions specifically addressed by that Act and reflects no intent to grant a right of direct appeal in retirement cases.

II

Even if the Court concludes that the Federal Circuit has subject matter jurisdiction under 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9) over civil service retirement cases generally, judicial review in this case nevertheless is barred by 5 U.S.C. 8347(c). That section provides that OPM's decisions on questions of disability "are final and conclusive and are not subject to review," except for *administrative* review by the MSPB under 5 U.S.C. 8347(d)(1). Petitioner sought in the court of appeals to have the MSPB's decision set aside on the ground that it was not supported by substantial evidence, but he now appears to concede that judicial review of

the factual basis of the MSPB's decision is precluded. He contends, however, that the court of appeals may review the MSPB's decision to determine whether it committed an error of law or procedure. This contention is plainly wrong.

Section 8347(c) on its face does not distinguish among the grounds on which review may be sought. It broadly bars all judicial review of administrative "decisions" on "questions" of disability "arising under" the retirement subchapter. This language plainly encompasses a question of interpretation of any provision of that subchapter that has a bearing on the determination of disability. Moreover, 5 U.S.C. 8347(c) accords finality not to "findings" of fact, but to administrative "decisions"—a term that connotes the judgment of an adjudicatory body that resolves all issues in dispute, legal as well as factual. Petitioner has cited nothing in the sparse legislative history of 5 U.S.C. 8347(c) to suggest that Congress did not mean what it said. This construction of 5 U.S.C. 8347(c) also is consistent with the scope of the parallel statutory preclusions of judicial review in 5 U.S.C. 8128 (b), applicable to federal workers' compensation benefits, and 38 U.S.C. 211(a), with respect to veterans' benefits. See *Johnson* v. *Robison*, 415 U.S. 361, 367-373 (1974). Finally, 5 U.S.C. 8347(d)(2) expressly authorizes judicial review of questions of law and procedure in cases of agency-filed applications based on mental disability. This indicates that Congress intended to bar such review in all other circumstances.

Petitioner nevertheless argues that judicial review should be available under the former Court of Claims' so-called "*Scroggins* formula," which permitted a court to set aside an administrative decision on a question of disability "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" *Scroggins* v. *United States*, 397 F.2d 295, 297, cert. denied, 393 U.S.

952 (1968) (quoting *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, cert. denied, 371 U.S. 936 (1962)). The Federal Circuit properly rejected that approach. The "*Scroggins* formula" has no basis in the text of 5 U.S.C. 8347(c), and the Court of Claims in fact never attempted to find such a basis. The quoted language was originally taken verbatim from a decision in a retirement case in which 5 U.S.C. 8347(c) did not even apply, and it then was repeated in subsequent Court of Claims' opinions without further analysis. Moreover, the validity of the *Scroggins* formula was seriously undermined by this Court's decision in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

It also is significant that *Scroggins* and related decisions involved agency-filed applications based on mental disability. Congress in 1980 specifically addressed the unique problems in such cases—which are akin to adverse actions—by creating a narrow exception to 5 U.S.C. 8347(c) that permits judicial review pursuant to 5 U.S.C. 7703(b)(1). But Congress did not authorize review of other disability determinations. Nor did Congress reenact the preclusion of review in 5 U.S.C. 8347(c) in 1980, such that it could be thought to have incorporated the now-discredited *Scroggins* construction into the statutory language.

ARGUMENT

This case presents two separate questions. The first is whether the United States Court of Appeals for the Federal Circuit has subject matter jurisdiction under 28 U.S.C. 1295(a)(9) to entertain direct appeals from decisions of the Merit Systems Protection Board in civil service retirement matters generally, or whether, as we argue in Point I, an action instead must be brought in the first instance in the Claims Court or a federal district court under the Tucker Act to recover payments of retirement benefits allegedly owed. If the Court concludes that the court of appeals does not have jurisdiction over such cases under 28 U.S.C. 1295(a)(9), the judgment

below dismissing the appeal for lack of jurisdiction (J.A. 60) should be affirmed on that ground or the case should be transferred to the Claims Court. In that event there would be no occasion for the Court to reach the question addressed in Point II: whether 5 U.S.C. 8347(c) precludes judicial review of the Office of Personnel Management's determination that petitioner is not disabled.

The court of appeals did not decide in this case whether it has jurisdiction under 28 U.S.C. 1295(a)(9) over civil service retirement cases generally. It held instead that judicial review was barred in this case in any event by 5 U.S.C. 8347(c) and dismissed the appeal on that ground. Notwithstanding the court of appeals' approach, we submit that the Court should consider the question of the court of appeals' jurisdiction under 28 U.S.C. 1295(a)(9) at the outset. If the court of appeals did not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain a direct appeal from the MSPB's decision, the case was not properly "in" the court of appeals and this Court does not have certiorari jurisdiction under 28 U.S.C. 1254(1) to review the decision below on other issues. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-742 (1982).

Moreover, the question whether an applicant for retirement benefits may take a direct appeal to the Federal Circuit from an adverse decision by the MSPB is itself one of broad importance warranting resolution by this Court, because it affects the proper allocation of jurisdiction between the Federal Circuit on the one hand and the Claims Court and district courts on the other in *all* civil service retirement cases. After the Federal Circuit rendered its decision in this case, a divided panel of that court held that the Federal Circuit *does* have jurisdiction under 28 U.S.C. 1295(a)(9) over direct appeals from MSPB decisions in retirement cases if the applicant for retirement benefits is a former employee and if review is not barred by 5 U.S.C. 8347(c). *Bronger* v. *OPM*, No. 83-1349 (Fed. Cir. July 26, 1984). Since the Court now has the benefit of the court of appeals' views, there is no

reason to postpone consideration of the jurisdictional issue,[4] particularly since two other courts of appeals have reached a contrary conclusion. *Lancellotti* v. *OPM*, 704 F.2d 91, 95-96 (3d Cir. 1983); *Morgan* v. *OPM*, 675 F.2d 196, 198 (8th Cir. 1982). Resolution of this threshold jurisdictional issue therefore is clearly warranted.

I. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT DOES NOT HAVE JURISDICTION UNDER 28 U.S.C. 1295(a)(9) TO ENTERTAIN DIRECT APPEALS FROM MSPB DECISIONS IN CIVIL SERVICE RETIREMENT CASES

The court of appeals for the Federal Circuit does not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain direct appeals from MSPB decisions in civil service retirement cases, with one narrow exception that has no application here. 28 U.S.C. 1295(a)(9) provides that the Federal Circuit shall have jurisdiction of "an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5." Section 7703(b)(1) authorizes any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the MSPB to petition for judicial review in the Federal Circuit, except in cases involving allegations of discrimination, which ordinarily are to be brought in district court.[5] The other judicial review provision referred to in

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[4] The Solicitor General has determined that a petition for rehearing en banc will be filed in *Bronger*, seeking review of the court's ruling on the merits but suggesting that the petition be held pending this Court's decision in this case with regard to the jurisdictional issue.

[5] 5 U.S.C. 7703(b)(2) provides that cases of discrimination shall be filed under Section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), Section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) (the Equal Pay Act, 29 U.S.C. 206(d)), as applicable. The first two of those sections provide for suits to be filed in district court, and the

28 U.S.C. 1295(a)(9)—5 U.S.C. 7703(d)—permits the Director of OPM to petition the Federal Circuit for review of certain MSPB decisions and is not involved here.

As explained below, the provision in 5 U.S.C. 7703(b)(1) for an employee or applicant for employment to obtain direct review of an MSPB decision in the court of appeals was first enacted in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, as part of a comprehensive revision of the procedures for administrative and judicial review of adverse actions and similar measures instituted by an agency against an employee on the ground of misconduct or substandard performance. The statutory provisions then in effect for review of applications for civil service retirement benefits were distinct from those applicable to adverse actions. There is no indication in the text or legislative history of the Civil Service Reform Act and subsequent enactments that Congress intended to depart from prior practice by channeling requests for review in retirement proceedings through the new adverse action procedures, including the judicial review provisions in 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9). The court of appeals therefore did not have jurisdiction over this case under those provisions.

A. The Civil Service Laws Have Always Provided Separate Review Mechanisms For Retirement Cases And Adverse Actions

1. *Adverse Actions And The Civil Service Reform Act*

Prior to 1978, the Lloyd-LaFollette Act (5 U.S.C. (1976 ed.) 7501) provided that an adverse action (a removal

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third provides for a suit to be filed in a court of competent jurisdiction (either the district court or the Claims Court, under the Tucker Act). The right to a trial de novo in such cases is guaranteed by 5 U.S.C. 7703(c).

or suspension without pay) could be taken against an employee in the competitive service only for such cause as would promote the efficiency of the service. That Act required the agency to furnish the employee with notice of the charges against him and an opportunity to respond. The Veterans Preference Act (5 U.S.C. (1976 ed.) 7701) in turn provided for an appeal to the Civil Service Commission from the agency's decision, but only in adverse actions taken against preference eligible employees. However, the right to an appeal and to an evidentiary hearing were extended administratively to all employees in the competitive service by Executive Order of the President and implementing Civil Service Commission regulations. See *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), slip op. 19 n.30; *Arnett* v. *Kennedy*, 416 U.S. 134, 142 n.8 (1974) (opinion of Rehnquist, J.).

In the Civil Service Reform Act of 1978, Congress reenacted and revised the Lloyd-LaFollette Act's procedures governing removals and other adverse actions taken by an agency against an employee on the basis of misconduct or for other cause that would promote the efficiency of the service. 5 U.S.C. 7501-7514, 7541-7543. Congress also adopted similar procedures for removal or reductions in grade based on unacceptable performance (5 U.S.C. 4303). In each instance, Congress specifically provided for a right of appeal to the MSPB pursuant to 5 U.S.C. 7701. See 5 U.S.C. 4303(e), 7513(d), 7543(d).[6]

Section 7701, which replaced and expanded upon the Veterans Preference Act, provides that "[a]n employee, or applicant for employment," may submit an appeal to the MSPB from any action by an agency that is appealable to the MSPB by law or regulation. 5 U.S.C. 7701(a). Section 7701 confers on the appellant in such a case the statutory right to have an evidentiary hearing for which

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[6] The MSPB assumed the adjudicatory functions of the former Civil Service Commission in 1978. See 5 U.S.C. 1205(a)(1); Reorg. Plan No. 2 of 1978, Pt. I, 92 Stat. 3783, *reproduced at* 5 U.S.C. 1101 note.

a transcript will be kept and to be represented by an attorney or other representative (5 U.S.C. 7701(a)(1) and (2)) and provides for the payment of attorney's fees in certain circumstances (5 U.S.C. 7701(g)). Under 5 U.S.C. 7701(c), the agency's decision must be sustained by the MSPB if it is supported by a preponderance of the evidence[7]—which has the effect of placing the burden of proof on the agency—unless there was harmful error in the application of the agency's procedures or the decision was based on a prohibited personnel practice or was not in accordance with law.

Under 5 U.S.C. 7703(a)(1), "[a]ny employee or applicant for employment" adversely affected by a final decision of the MSPB may obtain judicial review of that decision. Section 7703(b)(1) provides that, except in discrimination cases (see page 13 & note 5, *supra*), such review shall be by a petition for review in the Federal Circuit. The court of appeals may set aside the MSPB's decision if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; obtained without following applicable procedures; or "unsupported by substantial evidence" in the record. 5 U.S.C. 7703(c). The provision for direct review in the court of appeals was intended to result in more consistent decisions than previously had resulted when employees challenged adverse actions in the district courts (see, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363 (1957))[8] and to eliminate an unnecessary layer of judicial review by the district courts, since review is on the basis of the administrative

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[7] An agency's action taken on the basis of unacceptable performance must be sustained if supported by substantial evidence rather than a preponderance of the evidence. 5 U.S.C. 7701(c).

[8] Suits for back pay also could be brought in the Court of Claims under the Tucker Act, 28 U.S.C. 1491. See *United States* v. *Testan*, 424 U.S. 392, 402 (1976); *United States* v. *Wickersham*, 201 U.S. 390 (1906).

record. S. Rep. 95-969, 95th Cong., 2d Sess. 52, 62-64 (1978).[9]

2. *The Civil Service Retirement Program*

The retirement chapter of the civil service laws (ch. 83, 5 U.S.C. 8301-8348) traditionally has contained procedures for adjudication and review of disputed claims that are distinct from those applicable to adverse actions. Prior to the division of responsibilities between OPM and the MSPB in 1978, all administrative responsibilities for the retirement program were vested in the Civil Service Commission. 5 U.S.C. (1976 ed.) 8347(a). The Commission was charged with prescribing application forms and regulations for that purpose and with adjudicating all claims for benefits under the program. 5 U.S.C. (1976 ed.) 8347(a) and (b). The latter responsibility included the determination of all issues that might bear on a claim for benefits, including whether the employee had completed the requisite number of years of service, the amount of the annuity due, and (where the claim was based on disability) whether the employee was disabled. An administrative decision under the retirement program affecting the rights of an individual then could be appealed by that individual within the Civil Service Commission. 5 U.S.C. (1976 ed.) 8347(d). It was well

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[9] As originally enacted, Sections 205 and 206 of the Civil Service Reform Act (92 Stat. 1143-1144) permitted judicial review of an MSPB decision either in the Court of Claims in a suit for back pay under the Tucker Act or by a petition for direct review in the court of appeals for the circuit in which the petitioner resided. See 5 U.S.C. (Supp. V 1981) 7703(b)(1) and (c); 28 U.S.C. (Supp. V 1981) 2342(6); 28 U.S.C. 2343. See also note 22, *infra*. However, in Sections 127(a) and 144(1) of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 37-38, 45), Congress removed jurisdiction to review MSPB decisions from the regional courts of appeals and vested exclusive jurisdiction of such cases in the newly created United States Court of Appeals for the Federal Circuit. See 5 U.S.C. 7703(b)(1); 28 U.S.C. 1295(a)(9).

established prior to 1978 that the applicant had the burden of proving his entitlement to retirement benefits,[10] that an employee was not entitled to a hearing on a claim for retirement benefits, and that the procedures required by the Lloyd-LaFollette Act and Veterans Preference Act in the case of adverse actions did not apply to retirement claims.[11]

There was no express provision in the civil service retirement laws authorizing an individual to obtain judicial review of an adverse decision by the Civil Service Commission on a claim for retirement benefits prior to 1978, just as there is no such express authorization today with regard to most retirement claims. Nevertheless, in *Dismuke* v. *United States*, 297 U.S. 167, 169-173 (1936), the Court held that a district court had jurisdiction under the Tucker Act to entertain a monetary claim to an annuity founded on the Civil Service Retirment Act. The Court stressed that the United States "is not, by the creation of claims against itself, bound to provide a remedy in the courts" and that it "may withhold all remedy" or "provide an administrative remedy and make it exclusive, however mistaken its exercise." 297 U.S. at 171-172. In the case of the Civil Service Retirement

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[10] See, *e.g.*, *Piccone* v. *United States*, 407 F.2d 866, 873 (Ct. Cl. 1969); *Cerrano* v. *Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), cert. denied, 382 U.S. 855 (1965); *Chavez* v. *OPM*, 6 M.S.P.B. 343, 351 (1981).

[11] See, *e.g.*, *Scroggins* v. *United States*, 397 F.2d 295, 298 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968); *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct. Cl. 1968) (plurality opinion); *Kleinfelter* v. *United States*, 318 F.2d 929, 932 (Ct. Cl. 1963); *Chafin* v. *Pratt*, 358 F.2d 349, 357 (5th Cir.), cert. denied, 385 U.S. 878 (1966); *United States* v. *Abbett*, 381 F.2d 609, 612 (5th Cir. 1967); *Cerrano* v. *Fleishman*, 339 F.2d 929, 931 (2d Cir. 1964), cert. denied, 382 U.S. 855 (1965); *Murphy* v. *Wilson*, 236 F.2d 737, 738 (D.C. Cir.), cert. denied, 352 U.S. 954 (1956); *Ellmore* v. *Brucker*, 236 F.2d 734, 735 (D.C. Cir.), cert. denied, 352 U.S. 955 (1956); *Smith* v. *Dulles*, 236 F.2d 739, 740 (D.C. Cir.), cert. denied, 352 U.S. 955 (1956); *Cantrell* v. *United States*, 240 F. Supp. 851, 853 (W.D.S.C. 1965), aff'd, 356 F.2d 915 (4th Cir. 1966).

Act, however, the Court concluded that Congress's grant of administrative authority to adjudicate claims was not intended to preclude the courts from ascertaining whether the claimant was entitled to an annuity as a matter of law on the basis of the undisputed or conceded facts before the agency. *Id.* at 172-173.

Subsequently, in 1956, the administrative provisions of the Civil Service Retirement Act were revised to restrict judicial review specifically with respect to determinations of disability. The new legislation provided that "[q]uestions of dependency and disability arising under [the Retirement] Act shall be determined by the [Civil Service] Commission and its decisions with respect to such matters shall be final and conclusive and shall not be subject to review." Act of July 31, 1956, § 401, 70 Stat. 758, later codified at 5 U.S.C. (1976 ed.) 8347(c).

When the Civil Service Reform Act was enacted in 1978, the only change made in the administrative provisions of the retirement chapter of Title 5 was to divide the responsibilities of the former Civil Service Commission between OPM and the MSPB. OPM was given responsibility for administering the retirement program, prescribing regulations and application forms and adjudicating claims, and the MSPB was given authority to entertain appeals from OPM's decisions in these matters. See § 906(a)(2), (3) and (9), 92 Stat. 1224-1225, amending 5 U.S.C. 8347(a), (b) and (d). These changes were characterized as "Technical and Conforming Amendments" (92 Stat. 1224), and there is no indication that any substantive changes were intended. Congress did not, for example, amend 5 U.S.C. 8347 to provide that administrative appeals in retirement cases would be heard under the newly enacted procedures in 5 U.S.C. 7701 for appeals in adverse actions and similar cases. Nor did Congress amend 5 U.S.C. 8347 to provide that an individual seeking judicial review of an adverse administrative ruling on his application for retirement benefits must

petition for review pursuant to the newly enacted 5 U.S.C. 7703.

In 1980, however, Congress did amend 5 U.S.C. 8347 (d) explicitly to provide for the application of the special procedures in 5 U.S.C. 7701 and 7703 to one particular category of civil service retirement cases: those in which OPM found the individual to be disabled in whole or in part on the basis of the individual's mental condition, but only if that finding was made pursuant to an application filed by the agency, not the employee, requesting that the employee be retired on the basis of disability. 5 U.S.C. 8347(d)(2).

B. Congress Did Not Make The Direct Appeal Procedure In 5 U.S.C. 7703 Applicable To Claims For Civil Service Retirement Benefits

Against the background of the discussion in Point A, it seems clear that 28 U.S.C. 1295(a)(9) and 5 U.S.C. 7703(b)(1) do not constitute a general grant of jurisdiction to the Federal Circuit to entertain direct appeals from decisions of the MSPB in civil service retirement cases. Congress did not intend when it enacted 5 U.S.C. 7703(b)(1) to supplant the normal procedure for judicial review of civil service retirement claims under the Tucker Act that existed prior to enactment of the Civil Service Reform Act.

1. Perhaps most significantly, Congress has demonstrated that when it intends individuals adversely affected by MSPB decisions on retirement claims to have a right of direct appeal to the court of appeals under 5 U.S.C. 7703, it has expressly so provided. Thus, in 1980, Congress amended 5 U.S.C. 8347(d) to provide for judicial review directly in the Federal Circuit pursuant to 5 U.S.C. 7703 in the narrow category of retirement cases in which the agency has filed an application for benefits based on the employee's mental condition. Pub. L. No. 96-500, 94 Stat. 2696, 5 U.S.C. 8347(d)(2). "In the

context of the statute's precisely drawn provisions," the fact that Congress expressly authorized judicial review pursuant to 5 U.S.C. 7703 in that one narrow category of retirement cases but in no others "provides persuasive evidence that Congress deliberately intended to foreclose" judicial review pursuant to 5 U.S.C. 7703 in all other cases. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). Indeed, it would have been unnecessary for Congress to authorize a direct appeal in involuntary mental disability cases in 1980 if it had already furnished a right of direct appeal in *all* retirement cases in 1978, as petitioner argues (Pet. Br. 32). See *Morgan* v. *OPM*, 675 F.2d 196, 200 (8th Cir. 1982).[12]

2. The text of 5 U.S.C. 7703 also establishes that it was not intended to apply to retirement claims, except as expressly incorporated in 5 U.S.C. 8347(d)(2). Section 5 U.S.C. 7703(a)(1) grants a right of judicial review only to an "employee or applicant for employment" adversely affected by a final order or decision of the MSPB. The same limiting phrase is repeated in other provisions of Section 7703 as well. See 5 U.S.C. 7703(a)(2) and (c).

Section 8347(d), by contrast, provides for an appeal to the MSPB from any administrative ruling on a retirement claim that affects the rights or interests of an "individual." The category of "individuals" involved in retirement matters is far broader than the category of "employees" specifically mentioned in 5 U.S.C. 7703(a).[13] The "individuals" whose rights may be affected by OPM decisions in retirement matters, but who are not "em-

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[12] The legislative history of the 1980 amendments to 5 U.S.C. 8347 indicates that Congress believed that it was furnishing a new right of direct appeal. See S. Rep. 96-1004, 96th Cong., 2d Sess. 2, 4-5, 6 (1980); H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 5, 6, 8 (1980); 126 Cong. Rec. 29700 (1980) (remarks of Sen. Pryor).

[13] Mere applicants for employment, the other group of persons granted a right of review under 5 U.S.C. 7703(a), obviously have no claim to retirement benefits.

ployees,"[14] include Members of Congress (5 U.S.C. 8331 (2), 8332(a)); "annuitants," who are former employees and former Members of Congress who meet the requirements for civil service annuities (5 U.S.C. 8331(9)); "survivors" and "survivor annuitants," who are individuals entitled to civil service annuities based on the service of a deceased employee, Member of Congress, or annuitant (5 U.S.C. 8331(10) and (11), 8341); and persons who are entitled to lump-sum payments from the Civil Service Retirement and Disability Fund (see 5 U.S.C. 8331(8), 8342). Thus, the language of 5 U.S.C. 7703(a)(1) simply is not suited to furnishing a right of judicial review in the broad category of claims that arise under the civil service retirement program. This incongruity is significant, because "[j]urisdictional statutes are to be construed 'with precision and fidelity to the terms by which Congress has expressed its wishes'" (*Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580-581 (1982), quoting *Palmore* v. *United States*, 411 U.S. 389, 396 (1973)). See also *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 6.

It is true that 5 U.S.C. 7703(b)(1) itself does not contain the phrase "employee or applicant for employment"; it simply states that, except in discrimination cases addressed by 5 U.S.C. 7703(b)(2), a petition for review of an MSPB decision shall be filed in the Federal Circuit. But there is no indication that Congress thereby intended implicitly to confer a right of direct appeal under 5 U.S.C. 7703(b)(1) to persons other than the employees and applicants who are explicitly granted a right of judicial review by 5 U.S.C. 7703(a)(1). Instead, 5 U.S.C. 7703(b)(1) appears to be nothing more than a venue provision that identifies the court in which an employee or applicant may exercise the right of judicial review conferred by 5 U.S.C. 7703(a)(1). See page 29, *infra*. It is significant in this regard that the other venue

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[14] See 5 U.S.C. 8331(1), 2105.

provision, 5 U.S.C. 7703(b)(2), also is necessarily limited to employees and applicants even though it likewise does not so state, because the antidiscrimination statutes under which an action may be brought in district court under that paragraph all are limited to employees and applicants for employment. See 29 U.S.C. 215, 216(b), 633a(a); 42 U.S.C. 2000e-16(a).

The Federal Circuit in *Bronger* v. *OPM*, *supra*, agreed that Section 7703(a)(1) identifies the persons who may file a petition for review under Section 7703(b)(1)—namely, employees and applicants for employment. Slip op. 9. See also *Gilman* v. *OPM*, No. 84-764 (Fed. Cir. Sept. 12, 1984), slip op. 3-4. The panel in *Bronger* nevertheless held that it had jurisdiction under 5 U.S.C. 7703(b)(1) over the retirement claim there at issue on the ground that the individuals involved (former air traffic controllers who were separated from their positions because they had participated in an illegal strike) could be regarded as "employees." In contrast, the panel in *Gilman* held that a direct appeal to the Federal Circuit did *not* lie under 28 U.S.C. 1295(a)(9) and 5 U.S.C. 7703(b)(1) because the applicant in that case—who was claiming benefits as the surviving spouse of a deceased civil service annuitant—was not and never was an employee. Her suit therefore should have been brought in the Claims Court under the Tucker Act. There is no indication, however, that Congress intended to provide such different avenues of judicial review under the same overall retirement program depending upon the status of the applicant.

The panel in *Bronger* reasoned that it would be illogical to conclude that because the air traffic controllers had been effectively removed from their jobs, they became "nonemployees" who could not seek judicial review pursuant to 5 U.S.C. 7703 of the denial of their applications for retirement benefits. In the panel's view, that rationale also would deprive the Federal Circuit of jurisdiction under 5 U.S.C. 7703(b)(1) in adverse action cases in which the individual had been removed from his posi-

tion by the time he filed a petition for judicial review of the removal. Slip op. 10-11. But it is the panel's reasoning in *Bronger* that is illogical. The text and legislative history of 5 U.S.C. 7703(a) and (b) make unambiguously clear that they were specifically intended to govern removals and other adverse actions. Those measures are taken against an individual when he is an "employee," because of his conduct as such. The individual obviously does not lose his right of appeal if he is deprived of his status as an employee while he seeks review of the adverse action.

By contrast, OPM decisions on claims for retirement benefits affect numerous individuals who were not "employees" at the time the challenged actions occurred or the administrative proceedings were instituted. That was the case here and in *Bronger*, for in each instance the individual did not file his application for retirement benefits until after he had been separated from his position. See page 2, *supra*. Moreover, the court in *Bronger* did not offer a bright-line test, which is essential in fashioning jurisdictional rules. See *Heckler v. Edwards*, slip op. 6. Although the applications for retirement benefits by the air traffic controllers were reasonably contemporaneous with and related to their removal, issues under the retirement program involving many former employees have no such nexus. That would be true, for example, of questions concerning the rights of annuitants who have long since left their positions. These factors strongly indicate that Congress did not intend 5 U.S.C. 7703(a) and (b)(1) to apply to *any* retirement cases.[15]

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[15] The remainder of the reasoning in *Bronger* is equally unpersuasive. First, the panel relied on a presumption in favor of judicial review. Slip op. 8. But that presumption has no relevance here, because the question is only *which* court has jurisdiction. We concede that the Claims Court does have jurisdiction to review the MSPB's decision in a retirement case in a suit under the Tucker Act (except to the extent review is barred by 5 U.S.C. 8347(c)). Second, the panel expressed the view that Congress's explicit au-

3. The conclusion that 5 U.S.C. 7703(b)(1) does not apply to retirement claims also is supported by the text of the administrative appeal provision in 5 U.S.C. 7701. Section 7703(b) must be read in conjunction with Section 7701, because together they constitute a single integrated procedure by which individuals adversely affected by various personnel actions initiated by federal agencies may challenge those actions.[16] Section 7701(a) provides for a right of administrative appeal to the MSPB only by "[a]n employee, or applicant for employment," and thus likewise by its terms does not apply to the broad category of retirement appeals that may be

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thorization in 5 U.S.C. 8347(d)(2) for judicial review pursuant to 5 U.S.C. 7703 in cases of agency-filed applications for retirement benefits based on mental disability actually "bolsters" the conclusion that Congress intended to authorize a direct appeal pursuant to 5 U.S.C. 7703 in other retirement cases as well, even though Congress did not so specify. Slip op. 7-8. As we have already explained (see pages 20-21, *supra*), however, Congress's express incorporation of 5 U.S.C. 7703 in that one instance but in no others leads to precisely the opposite conclusion.

The panel in *Bronger* did not dispute OPM's contention that the legislative history of the Civil Service Reform Act contains no mention of judicial review in civil service retirement cases and that it focuses instead on judicial review of adverse actions. Slip op. 6-7, 11. The panel attempted to discount the relevance of that legislative history by noting that the question of entitlement to retirement benefits involved in *Bronger* was intimately bound up with the circumstances of the applicants' removal from their positions. Slip op. 11-12. That reasoning is erroneous, however, because the employees were not actually challenging their removal. Reliance on that peculiar factual aspect of *Bronger* also would not furnish a clear test of jurisdiction in retirement cases generally. Moreover, the Federal Circuit has not appeared to require such a nexus between an adverse action and the retirement claim in its unpublished opinions in two cases decided since *Bronger*. See *Biggs* v. *OPM*, No. 84-1141 (Aug. 1, 1984); *Viray* v. *OPM*, No. 83-1088 (Aug. 28, 1984).

[16] The term "personnel action" is defined in 5 U.S.C. 2302(a)(2) to include various actions affecting employees or former employees seeking to resume their duties, but does not include decisions in retirement cases.

taken under 5 U.S.C. 8347(d) by individuals other than "employees." A construction of 5 U.S.C. 7701 that excludes retirement claims also is consistent with the firmly settled practice prior to 1978, under which the Civil Service Commission and the courts had uniformly held that retirement appeals were not covered by the procedures applicable to adverse actions under the Lloyd-LaFollette and Veterans Preference Acts. See pages 17-18, *supra*.

There is no indication that Congress intended to eliminate the distinction between the two procedures when it enacted the Civil Service Reform Act of 1978. To the contrary, the indications are that when Congress intended appeals to be taken to the MSPB under the special procedures in 5 U.S.C. 7701—including the statutory requirements of an evidentiary hearing, the placing of the burden of proof on the agency, and allowance of attorney's fees—it expressly so provided. See 5 U.S.C. 3593(c)(2), 3595(c), 4303(e), 7513(d), 7543(d). All of those sections pertain to adverse personnel decisions, which are quite different in nature from claims for retirement annuities. Congress's failure to make a comparable reference to the adverse action procedures of 5 U.S.C. 7701 in the civil service retirement statute—even though it did amend 5 U.S.C. 8347(d) to authorize an individual adversely affected by an OPM decision on a retirement claim to appeal to the MSPB—furnishes a compelling indication that Congress did not intend to apply the new provisions of 5 U.S.C. 7701 to retirement appeals. *United States* v. *Erika, Inc.*, 456 U.S. at 208; *Lehman* v. *Nakshian*, 453 U.S. 156, 167-168 (1981).[17]

Consistent with this view, the courts of appeals have held that appeals to the MSPB in retirement cases are

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[17] The legislative history discusses the appeals process and 5 U.S.C. 7701 only in connection with adverse actions and similar personnel measures, without any reference to retirement claims. See H.R. Rep. 95-1403, 95th Cong., 2d Sess. 4-5, 21-23 (1978); S. Rep. 969, *supra*, at 9-10, 24, 40, 42-45, 51-62; H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 137-139 (1978).

taken pursuant to 5 U.S.C. 8347(d)(1) under whatever procedures are "prescribed by the Board" (*ibid.*), not pursuant to 5 U.S.C. 7701.[18] Congress's decision when it enacted the Civil Service Reform Act to maintain the distinction between adverse actions and retirement claims for purposes of *administrative* review strongly reinforces the conclusion that Congress did not sub silentio merge the two together for purposes of *judicial* review under 5 U.S.C. 7703(b)(1).[19]

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[18] See *Banda* v. *OPM*, 727 F.2d 471, 472-473 (5th Cir. 1984); *Williams* v. *OPM*, 718 F.2d 1553, 1554 (Fed. Cir. 1983); *Frank* v. *OPM*, 727 F.2d 1117 (1983), cert. denied, No. 83-5914 (Mar. 19, 1984); *Dawson* v. *MSPB*, 712 F.2d 264, 269 & n.5 (7th Cir. 1983); *Scarborough* v. *OPM*, 723 F.2d 801, 809-811 (11th Cir. 1984). See also *Frazier* v. *MSPB*, 672 F.2d 150, 154-155 (D.C. Cir. 1982); but cf. *Turner* v. *OPM*, 707 F.2d 1499, 1501 (D.C. Cir. 1983). The MSPB at one time took the position that appeals to it from OPM decisions on retirement claims were taken pursuant to 5 U.S.C. 7701. See *Chavez* v. *OPM*, 6 M.S.P.B. 343, 348-349 (1981); cf. 5 C.F.R. 1201.3(a)(6). However, in *Cheeseman* v. *OPM*, No. PH 08318310675 (June 5, 1984), slip op. 10-11, the MSPB denied an award of attorney's fees on the basis of the Federal Circuit's decision in *Williams* v. *OPM*, which held that retirement appeals are not brought under 5 U.S.C. 7701.

[19] The conclusion that Congress, when it enacted the Civil Service Reform Act in 1978, did not intend to include civil service retirement appeals under the new adverse action appeal procedures in 5 U.S.C. 7701 is confirmed by the fact that two years later, Congress amended 5 U.S.C. 8347(d) specifically to require that the procedures in 5 U.S.C. 7701 be followed in appeals to the MSPB in one particular category of retirement cases: those in which OPM, acting on an agency-filed application, found the employee disabled based on his mental condition. 5 U.S.C. 8347(d)(2). These are the same cases for which Congress also specified that judicial review would be pursuant to 5 U.S.C. 7703. Congress's express provision that the formal procedures in 5 U.S.C. 7701 be utilized in the one category of cases clearly indicates that Congress did not intend Section 7701 to govern other retirement cases. *United States* v. *Erika, Inc.*, 456 U.S. at 208.

Moreover, the legislative history of the 1980 amendment in fact shows that Congress believed that administrative appeals in re-

4. There also is no indication in the legislative history of the Civil Service Reform Act that Congress intended 5 U.S.C. 7703(b)(1) to apply to civil service retirement cases. The House Report discusses the judicial review provision only in the context of adverse actions and similar personnel measures and describes it as applicable to "decisions of the Board appealed by an employee or applicant for employment" (H.R. Rep. 95-1403, 95th Cong., 2d Sess. 22-23 (1978))—language that, as we have explained, does not adequately describe the category of persons who may take an appeal to the MSPB on retirement matters.

Similarly, the Senate Report states that the provision of the Senate bill that was identical to 5 U.S.C. 7703(a)(1) as finally enacted "authorizes an employee or applicant adversely affected by a final order or decision of the Board to seek judicial review" (S. Rep. 95-969, 95th Cong., 2d Sess. 62 (1978)).[20] The report also states that

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tirement cases were not then governed by 5 U.S.C. 7701. See H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 5, 8 (1980); S. Rep. 96-1004, 96th Cong., 2d Sess. 2, 3, 5 (1980); 126 Cong. Rec. 29700 (1980) (remarks of Sen. Pryor); *id.* at 14816 (remarks of Rep. Corcoran).

[20] Petitioner relies (Pet. Br. 32) on a statement in the next sentence of the Senate Report that "[t]he section applies to judicial review of *all* final orders or decisions of the Board" (S. Rep. 95-969, *supra*, at 62 (emphasis added by petitioner)). This passage does not suggest that Section 7703(b)(1) applies to appeals in retirement cases. The Senate Report language quoted by petitioner refers to the provision eventually enacted as 5 U.S.C. 7703(a)(1), which is expressly limited to appeals by employees and applicants for employment, and therefore does not embrace all retirement appeals.

Similarly, although the reports on the Federal Courts Improvement Act of 1982 state that the newly created Federal Circuit would have jurisdiction over "all" or "any" appeals from the MSPB, they also state that jurisdiction over such appeals was then in the Court of Claims and the regional courts of appeals under 5 U.S.C. 7703(b)(1) and 7703(d). See H.R. Rep. 97-312, 97th Cong., 1st Sess. 18, 42-43 (1981); S. Rep. 97-275, 97th Cong., 1st Sess. 21 (1981). There accordingly is no indication that Congress intended to expand the category of cases that was covered

the provision of the bill that corresponds to 5 U.S.C. 7703(b) as finally enacted "specifies the forum in which an employee or applicant may bring the review proceeding" (S. Rep. 95-969, *supra*, at 63), thereby making clear that Section 7703(b)(1) is simply a venue provision and that the absence of an explicit reference to employees or applicants was not intended to broaden the right of direct appeal to the court of appeals. Finally, the Senate Report notes that "[s]ince U.S. District Courts are specifically given jurisdiction over life and health insurance cases under [5 U.S.C. 8715 and 8912], these provisions are not amended either" (S. Rep. 95-969, *supra*, at 63). This statement reflects a congressional intent not to disturb existing jurisdictional arrangements under federal employee benefit programs generally. Such programs were far removed from the central focus of the pertinent provisions of the Civil Service Reform Act, which was on adverse actions and similar personnel measures.[21]

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by 5 U.S.C. 7703(b)(1) as enacted in 1978. Moreover, as the decision in *Gilman* makes clear, the Federal Circuit has not taken jurisdiction over "all" MSPB decisions. Petitioner contends (Pet. Br. 36) that if the Federal Circuit does not have jurisdiction under 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9) to entertain a direct appeal from an MSPB decision in a civil service retirement case, the result would be to undermine the uniformity Congress intended when it established the Federal Circuit. Petitioner overlooks the fact that if claimants seeking retirement benefits bring an action under the Tucker Act in the Claims Court or district court, any appeal would be taken to the Federal Circuit (28 U.S.C. 1295(a)(2) and (3)), consistent with the goal of uniformity under the FCIA.

[21] The Senate Report also sheds light on 5 U.S.C. 7703(a)(2), which provides that the MSPB shall be the named respondent in any proceeding for judicial review "unless the employee or applicant for employment seeks review of a final order or decision issued by the Board under section 7701"; in that event the "agency responsible for taking the action" shall be the named respondent. Section 7703(a)(2) obviously contemplates that some orders or decisions rendered by the MSPB in cases that were not appealed to it pursuant to 5 U.S.C. 7701(a) are nevertheless subject to

5. For the foregoing reasons we believe that the Federal Circuit did not have jurisdiction under 28 U.S.C. 1295(a)(9) to entertain a direct appeal from the MSPB's decision affirming OPM's denial of petitioner's application for disability retirement benefits. Petitioner instead was required to bring an action under the Tucker Act for a money judgment in the amount of retirement benefits allegedly owing. 28 U.S.C. 1491(a)(1), 1346(a)(2). In fact, in his petition for review filed in the Court of Claims on June 8, 1981, petitioner invoked that court's Tucker Act jurisdiction in addition to asserting that judicial review was available under 5 U.S.C. 7703, which at that time permitted a petition for review to be filed in either the Court of Claims or a regional court of appeals (J.A. 44; see 5 U.S.C. (Supp. IV 1980) 7703(b)(1)).

After the October 1, 1982 effective date of the Federal Courts Improvement Act, the instant case was transferred to the Federal Circuit (J.A. 45) along with all other MSPB cases pending in the Court of Claims,

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judicial review under 5 U.S.C. 7703(b). However, this additional category of cases contemplated by 5 U.S.C. 7703(a)(2) does not include administrative appeals in civil service retirement cases, because Section 7703(a)(2) is expressly limited to judicial review in a proceeding brought by an "employee or applicant for employment." See also S. Rep. 95-969, *supra*, at 62.

The Senate Report makes clear that the decisions of the MSPB, other than those issued under 5 U.S.C. 7701, that Congress had in mind in permitting a direct appeal to the Federal Circuit pursuant to 5 U.S.C. 7703 are those over which the MSPB has *original* jurisdiction under the new procedures adopted in the Civil Service Reform Act, such as a decision imposing a fine or other disciplinary sanction against an employee in an action brought before the MSPB by the Special Counsel (see 5 U.S.C. 1207) or declining the Special Counsel's request to impose a permanent stay of a personnel action (5 U.S.C. 1208). See S. Rep. 95-969, *supra*, at 62. See also 5 U.S.C. 7521 (adverse action proceedings against administrative law judges conducted before the MSPB). There is no indication that Congress intended to permit judicial review directly in the court of appeals in retirement cases, which are not appealed to the MSPB pursuant to the special procedures in 5 U.S.C. 7701, are not within the MSPB's original jurisdiction, and do not concern a subject area otherwise addressed by the Civil Service Reform Act.

presumably on the premise that 5 U.S.C. 7703(b)(1) authorized a direct appeal to the Federal Circuit from MSPB decisions in retirement cases. That premise was incorrect, as we have shown. Insofar as petitioner brought his suit in the Court of Claims under the Tucker Act, Section 403(d) of the FCIA (96 Stat. 58) required it to be decided by the newly created Claims Court.[22] This case, therefore, should have been assigned to the Claims Court for a decision, subject to a right of appeal to the Federal Circuit, after final judgment, pursuant to 28 U.S.C. 1295(a)(3). See *Ellis* v. *United States*, 711 F.2d 1571, 1574-1575 (Fed. Cir. 1983); *Morris Mechanical Enterprises, Inc.* v. *United States*, 728 F.2d 497, 498 (Fed. Cir. 1984), petition for cert. pending on other grounds, No. 83-1903. The court of appeals' judgment dismissing the direct appeal could be affirmed on this ground. However, because petitioner properly invoked the subject matter jurisdiction of the Court of Claims under the Tucker Act prior to the effective date of the FCIA, the Court might wish to consider vacating the judgment below and remanding the case to the court of appeals with instructions to transfer the case to the Claims Court "in the interest of justice." See 28 U.S.C. 1631.

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[22] In *Dunn* v. *United States*, 654 F.2d 64, 66-67 (1980), the Court of Claims held that 5 U.S.C. 7703(b)(1), as originally enacted in 1978, did not confer a right of review in that court independent of the right to bring an action for back pay under the Tucker Act, 28 U.S.C. 1491(a)(1). See also H.R. Rep. 97-312, 97th Cong., 1st Sess. 18 (1981); *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1316-1317 (Fed. Cir. 1983). The reference in 5 U.S.C. (Supp. III 1979) 7703(b)(1) to the filing of a petition for review in the Court of Claims appears instead to have been intended to preserve a Tucker Act suit as an avenue of judicial review in adverse action and other cases covered by that section.

II. IF THE COURT OF APPEALS DID HAVE JURISDICTION UNDER 28 U.S.C. 1295(a)(9), JUDICIAL REVIEW NEVERTHELESS IS BARRED IN THIS CASE BY 5 U.S.C. 8347(c)

Even if the Court concludes, contrary to our submission in Point I, that the court of appeals did have jurisdiction over this case under 28 U.S.C. 1295(a)(9), the court of appeals' judgment dismissing the appeal nevertheless was correct because judicial review is barred in any event by 5 U.S.C. 8347(c). Section 8347(c) provides that OPM "shall determine questions of disability and dependency arising under" the retirement program and that, "[e]xcept to the extent provided under [5 U.S.C. 8347(d)], the decisions of [OPM] concerning these matters are final and conclusive and are not subject to review." Section 8347(d)(1), in turn, permits an individual whose rights are affected by an order or action of OPM under the retirement program to appeal to the MSPB, but it does not authorize judicial review. Under the statutory scheme, then, OPM's decisions on questions of disability are "final and conclusive and are not subject to review," except for *administrative* review of OPM's decisions by the MSPB. Congress thus has explicitly foreclosed *judicial* review of an administrative decision that an applicant for civil service retirement benefits is not disabled.

In this case, petitioner's application for retirement benefits was denied by OPM and then by the MSPB because they found that he was not disabled under the statute. In the court of appeals, petitioner sought review of the MSPB's decision on two grounds, arguing that (i) the decision was not supported by substantial evidence, and (ii) the MSPB improperly placed upon him the burden of proving that he was disabled (Ct. Cl. Br. 9-12, 15-16).[23]

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[23] In addition to challenging the MSPB's decision that he was not disabled, petitioner also argued below (Ct. Cl. Br. 12-15) that the Department of the Navy violated a provision of the Federal Personnel Manual, Supplement 831-1, S10-10a(6) (Feb. 29, 1980),

Petitioner now appears to concede (see Pet. Br. 20, 26) that 5 U.S.C. 8347(c) precluded the court of appeals from reviewing the MSPB's decision to determine whether it was supported by substantial evidence. This concession is well taken. Even those courts that have concluded that judicial review of MSPB decisions on questions of disability is not entirely foreclosed by 5 U.S.C. 8347(c) have unanimously held that a court is barred from reviewing the factual or evidentiary bases of the MSPB's decisions. See *Pitzak* v. *OPM*, 710 F.2d 1476, 1478-1479 (10th Cir. 1983); *Turner* v. *OPM*, 707 F.2d 1499, 1502 (D.C. Cir. 1983); *McCard* v. *MSPB*, 702

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when it removed him from his position while his application for disability retirement benefits was pending. He renews that argument here (see Pet. Br. 3, 16-17, 39-40), but it is not properly raised in this case. That issue would be relevant only to the question whether petitioner was lawfully removed from his position. Petitioner never challenged his removal by appealing the Naval Support Activity's decision to the MSPB, even though he was informed of his right to do so. See page 2, *supra*. He cannot now collaterally attack his removal in these proceedings concerning his eligibility for civil service retirement benefits. Thus, the question whether the Naval Support Activity followed applicable procedures in removing him was not properly before the MSPB or the court of appeals in this case. Petitioner's reliance (Pet. Br. 39) on *Piccone* v. *United States*, 407 F.2d 866 (Ct. Cl. 1969), is misplaced for this reason. In *Piccone*, the employee *did* pursue his administrative remedies to challenge his removal—on the ground that it was improperly effectuated while his application for retirement benefits was pending before the Civil Service Commission—and his suit in the Court of Claims likewise challenged his removal on that ground. 407 F.2d at 868-871.

Petitioner's challenge to his removal is without merit in any event. Under Federal Personnel Manual Supplement 831-1, S10-10a(6) (Feb. 29, 1980), "[t]he agency is required to retain an employee in an active-duty status pending a decision [by OPM] on an *agency* application for disability retirement" (see Pet. Br. App. 27a) (emphasis added)). In this case, the application for retirement benefits was filed by petitioner, not his agency. Moreover, petitioner did not file his application for retirement benefits with OPM until after the effective date of his removal. See page 2, *supra*.

F.2d 978, 983 (11th Cir. 1983); *Parodi* v. *MSPB*, 690 F.2d 731, 734 (9th Cir. 1982).[24]

Petitioner nonetheless argues (Pet. Br. 18-31) that, even if judicial review of the facts is foreclosed, 5 U.S.C. 8347(c) does not preclude a court from reviewing the MSPB's decision on a question of disability for purposes of determining whether the MSPB committed an error of law or procedure in arriving at its decision. This contention has a particularly hollow ring in the context of this case. Petitioner's only remaining objection to the MSPB's decision is that, in his view, the MSPB should have placed the burden on OPM rather than on him with regard to the evidence bearing on the question of disability. That is simply an indirect way of attacking the factual or evidentiary basis of the MSPB's decision and therefore should be equally foreclosed under any view of the scope of 5 U.S.C. 8347(c). See J.A. 71 (Nies, J., concurring); *McCard* v. *MSPB*, 702 F.2d at 983. Moreover, on the merits, petitioner's position on the burden of proof issue is frivolous.[25] Putting these flaws to

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[24] Accord, *Hackett* v. *OPM*, 721 F.2d 580, 582 (6th Cir. 1983); *Campbell* v. *OPM*, 694 F.2d 305, 306-307 (3d Cir. 1982); *Chase* v. *OPM*, 695 F.2d 790, 791 (4th Cir. 1982); *Morgan* v. *OPM*, 675 F.2d 196, 197, 201 (8th Cir. 1982).

[25] As the MSPB observed in *Chavez* v. *OPM*, 6 M.S.P.B. 343, 351 & n.17, 352 (1981), in rejecting the contention petitioner now makes, it was firmly established prior to enactment of the Civil Service Reform Act of 1978 that an applicant for civil service retirement benefits had the burden of proving his entitlement (see note 10, *supra*), and there is no indication whatever in the legislative history of the Civil Service Reform Act that Congress intended to reserve that settled practice. Indeed, since the passage of the Civil Service Reform Act, the courts have uniformly held that an applicant for retirement benefits continues to bear the burden of proof. See, *e.g.*, *Parodi* v. *MSPB*, 690 F.2d at 737, 739; *McCard* v. *MSPB*, 702 F.2d at 983; *Chase* v. *OPM*, 695 F.2d at 791; cf. *Turner* v. *OPM*, 707 F.2d at 1506. In addition, as the presiding official observed in this case (J.A. 30-31), the MSPB's rule requiring the applicant to prove he is disabled is consistent with the rule for establishing entitlement to Social Security disability benefits

one side, however, petitioner's contention that 5 U.S.C. 8347(c) bars judicial review only of issues of fact is without merit.

A. 5 U.S.C. 8347(c) Expressly Precludes Judicial Review Of Decisions On Employee-Filed Disability Applications Based On Physical Condition

5 U.S.C. 8347(c) provides that OPM "shall determine questions of disability * * * arising under this subchapter" and that "the decisions of OPM concerning these matters are final and conclusive and are not subject to review," except by the MSPB. As the court of appeals observed, "[i]t is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence" (J.A. 47).[26] Nothing in this "clear-

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(see *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976)) and benefits under other federal programs. See also *Alton R.R.* v. *United States*, 315 U.S. 15, 25 (1942) (the "applicant carries the burden of establishing his right to the statutory grant"). The burden of proof also is properly allocated to petitioner because he has greater access to the evidence concerning his own medical condition. See *United States* v. *New York, N.H. & H.R.R.*, 355 U.S. 253, 256 n.5 (1957). Petitioner's contrary argument—that OPM bears the burden of proving the negative (*i.e.*, that he is *not* disabled)—rests on his assertion that 5 U.S.C. 7701 governs appeals to the MSPB in retirement cases. See Pet. Br. 12-14, 36-38. As we have shown (see pages 25-27, *supra*), that contention is in error.

[26] Petitioner relies (Pet. Br. 18) on the presumption that agency action is reviewable. But as this Court recently held, this presumption "is just that—a presumption," and it "may be overcome by specific language" in the statute. *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 8. Moreover, the presumption in favor of judicial review ordinarily is applied in suits seeking review of administrative action, for which the Administrative Procedure Act (APA) itself reflects a presumption in favor of review. 5 U.S.C. 701(a)(1). As Judge Nichols observed (J.A. 62), however, this is a suit against the government seeking a monetary recovery, to which the presumption of review in APA-type suits does not apply. See 5 U.S.C. 702 (excluding suits for money damages); *United States* v. *Testan*, 424 U.S. 392, 400 (1976); *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 10-11.

cut statement" suggests that it does not apply to issues of law. To the contrary, a question of disability "arising under" the retirement subchapter plainly includes a question concerning the proper interpretation of any provision of that subchapter relating to disability. Cf. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 11-12, 16-18; *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975); *id.* at 789-790, 795 (Brennan, J., dissenting). It is significant also that Section 8347(c) accords finality to the "decisions" of OPM concerning matters of disability. The term "decision" in federal law connotes a judgment of an adjudicatory body that resolves all issues in dispute, both legal and factual. See, *e.g.*, 5 U.S.C. 7703(a)(1); 28 U.S.C. 1291, 1295(a)(9); 42 U.S.C. 405(g). If Congress had intended the preclusion of review to apply only to the resolution of factual issues, it presumably would have used the conventional term "findings" rather than "decisions." Moreover, in other statutory provisions precluding review, Congress has used the term "decisions" to refer to resolutions of questions of law as well as fact.[27]

Thus, the plain language of 5 U.S.C. 8347(c) bars judicial review of both legal and factual determinations that underlie an administrative decision on a question of disability arising under the civil service retirement laws. "[A]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Petitioner has pointed to nothing in the legislative history of the 1956 Act in which Con-

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[27] See, *e.g.*, 42 U.S.C. 405(h) ("No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided"; see *Weinberger* v. *Salfi*, 422 U.S. at 759 n.6, 761-762; *id.* at 789-790 (Brennan, J., dissenting)); 38 U.S.C. 211(a) ("the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration * * * shall be final and conclusive" and not subject to review; see *Johnson* v. *Robison*, 415 U.S. at 367-374; *Weinberger* v. *Salfi*, 422 U.S. at 761-762).

gress enacted the preclusion of review to indicate that Congress did not mean what it said. In fact, the legislative history of that Act does not shed any further light on the provision.[28]

The construction of 5 U.S.C. 8347(c) that its plain language requires also conforms to Congress's decision to bar judicial review of claims for benefits under the Federal Employees Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, which establishes a system of compensation for federal employees suffering work-related injuries. See *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984).

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[28] A finality clause similar to that now contained in 5 U.S.C. 8347(c) was first added to the Civil Service Retirement Act in 1948, but was limited to questions of dependency and disability arising under the section providing for survivorship benefits. Act of Feb. 28, 1948, ch. 84, § 11, 62 Stat. 56, amending § 12(d)(3) of the Civil Service Retirement Act of 1930. The reports on the 1948 Act do not shed any light on the scope of the preclusion of review. S. Rep. 746, 80th Cong., 1st Sess. 6-7 (1947); H.R. Rep. 888, 80th Cong., 1st Sess. 6-7 (1947). In 1956, when Congress revised the general administrative provisions of the Civil Service Retirement Act of 1930, the preclusion of review was made applicable to questions of disability and dependency arising under the entire Act, not merely its survivorship section. Act of July 31, 1956, ch. 804, § 401, 70 Stat. 759, amending § 17 of the Civil Service Retirement Act of 1930. Only the Senate bill contained provisions relating to civil service retirement (H.R. Conf. Rep. 2935, 84th Cong., 2d Sess. 32 (1956)), and the Senate Report does not discuss the preclusion provision. S. Rep. 2642, 84th Cong., 2d Sess. 13 (1956).

Petitioner contends (Pet. Br. 23) that Congress's silence on the question in the legislative history must mean that Congress could not have intended to preclude all judicial review. This Court has made clear, however, that silence in the legislative history does not overcome the plain language of a statute. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980). Moreover, contrary to petitioner's submission, the absence of legislative history on the statutory preclusion of review is neither surprising nor an indication that 5 U.S.C. 8347(c) should not be given its natural effect. The Court noted in *Johnson* v. *Robison* that the legislative history of 38 U.S.C. 211(a) also was "scant" (see 415 U.S. at 373; see also *id.* at 368-369). That provision expressly bars review of questions of law as well as fact, yet Congress evidently did not regard it as worthy of extended debate.

In 5 U.S.C. 8128(b)(1), Congress provided that the action of the Secretary of Labor in allowing or denying a claim is "final and conclusive for all purposes and with respect to all questions of law and fact" and is not subject to judicial review. The determinations that are made in the administration of FECA are similar to those arising under the civil service disability retirement program, and, indeed, a federal employee often may receive benefits under each. See 5 U.S.C. 8337(e) and (f). There accordingly is no reason to believe that Congress intended the preclusion of review in 5 U.S.C. 8347(c) to be less sweeping than that in 5 U.S.C. 8128(b).

The court of appeals' construction of 5 U.S.C. 8347(c) likewise is consistent with this Court's decision in *Johnson* v. *Robison*, 415 U.S. 361 (1974), which construed the parallel statutory bar in 38 U.S.C. 211(a) to judicial review of decisions of the Veterans Administration on applications for veterans' benefits. Section 211(a) provides that the administrative determination on questions of law and fact is "final and conclusive" and shall not be subject to review. This Court recognized in *Johnson* v. *Robison* that Congress had foreclosed judicial review of individual benefit claims because of the wide variety of medical, legal and other technical questions that often are involved and because of the need to ensure adequate and uniform resolution of these questions without expensive and time-consuming litigation. 415 U.S. at 370-373 & n.12. These same considerations underlie the bar to judicial review of the often complex medical, legal, and other questions relating to a determination of disability under the civil service retirement system.[29]

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[29] The Court held in *Johnson* v. *Robison* that 38 U.S.C. 211(a) does not bar a court from deciding the constitutionality of veterans' benefits legislation. It explained that such a constitutional challenge is not to a decision of the *Administrator*, but rather to a decision of *Congress* to create a particular statutory classification, and that the constitutionality of the statute—unlike a question of law or fact arising under it—was beyond the authority of the

Finally, Congress demonstrated in the 1980 amendments to 5 U.S.C. 8347 that when it intends to permit judicial review on questions of disability arising under the civil service retirement program, it will expressly so provide. In the 1980 amendments, Congress qualified the preclusion of review in Section 8347(c) to make it applicable "[e]xcept to the extent provided under subsection (d) of this section." In Subsection (d)(1), Congress retained the provision for administrative review by the MSPB in retirement cases generally. In a new Subsection (d)(2), Congress provided that if OPM has found an individual to be disabled "in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an

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Administrator to decide. 415 U.S. at 367-368. Similarly, in this case, the court of appeals indicated that 5 U.S.C. 8347(c) does not preclude a constitutional challenge to the civil service retirement laws (J.A. 50). Petitioner, however, does not challenge the constitutionality of any provision of those laws.

Petitioner does attempt to cast his argument that the MSPB should have placed the burden of proof on OPM in constitutional terms, contending that this allocation of the burden of proof is required by 5 U.S.C. 7701(c) or implementing MSPB regulations and that the MSPB's failure to follow these provisions in turn violated his due process rights. See Pet. Br. 12-15, 16-18, 36-38. The initial premise of petitioner's argument is incorrect. As we have explained (see pages 17-18, 25-27, *supra*), 5 U.S.C. 7701(a) does not apply to retirement appeals, and it is well settled that the applicant has the burden of proving his entitlement to retirement benefits. In any event, petitioner's attempt to convert his question of interpretation of statutes and regulations into one of constitutional dimension is pure bootstrap. If a particular regulation or statutory provision is not itself mandated by the Constitution, a violation of the provision does not rise to the level of a constitutional violation. *United States* v. *Caceres*, 440 U.S. 741, 751-752 (1979); *Board of Curators* v. *Horowitz*, 435 U.S. 78, 92 n.8 (1978). See also *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 9. The Constitution surely does not prohibit the government from placing the burden of proof on the applicant for statutory benefits. Because petitioner's "constitutional" argument is frivolous, there is no need to consider in this case whether 5 U.S.C. 8347(c) bars a due process challenge to a particular decision on a question of disability. See *Heckler* v. *Ringer*, slip op. 5 n.4.

agency for purposes of disability retirement * * *, the decision of the Board shall be subject to judicial review under [5 U.S.C.] 7703."

On judicial review under 5 U.S.C. 7703, a court may set aside the MSPB's decision if it was arbitrary or capricious, not in accordance with law, obtained without following applicable procedures, or unsupported by substantial evidence. 5 U.S.C. 7703(c). Thus, by incorporating 5 U.S.C. 7703(c) into 5 U.S.C. 8347(d)(2), Congress affirmatively authorized the Federal Circuit to review a disability decision of the MSPB with regard to questions of law and procedure, but only in the narrow category of agency-filed mental disability cases.[30] The fact that Congress did not similarly authorize review of questions of law or procedure with respect to other disability retirement claims "provides persuasive evidence that Congress deliberately intended to foreclose" judicial review of such questions in all other cases. *United States* v. *Erika, Inc.*, 456 U.S. at 208. See also *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 6.

The logic and purpose of the narrow exception in 5 U.S.C. 8347(d)(2) further reinforce the conclusion that judicial review is foreclosed in this case. In adverse actions and related matters typically covered by 5 U.S.C. 7701(a) and 7703(b)(1), the agency initiates the proceedings against the employee. Under the civil service retirement program, on the other hand, proceedings ordinarily are initiated when an individual files an application for benefits. However, Congress determined in 1980 that where the agency rather than the employee files the retirement application and does so on the ground that the employee has a disabling mental impairment, the process closely resembles an adverse action, especially in light of the stigma that may attach to an OPM finding

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[30] See also H.R. Rep. 96-1080, *supra*, at 3, 6; S. Rep. 96-1004, *supra*, at 4; 126 Cong. Rec. 14816 (1980) (remarks of Rep. Spellman); *ibid.* (remarks of Rep. Corcoran); *id.* at 29700 (remarks of Sen. Pryor).

of mental impairment. See S. Rep. 96-1004, 96th Cong., 2d Sess. 2-3, 5 (1980); H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 8, 10 (1980); 126 Cong. Rec. 14815-14816, 14817 (1980) (remarks of Rep. Spellman). It is consistent with this determination for Congress to require that the formal administrative and judicial review procedures applicable to adverse actions under 5 U.S.C. 7701 and 7703 be followed in this sensitive area. The considerations that motivated Congress in permitting judicial review of the question of disability in this narrow category of cases simply do not apply where, as here, the employee himself filed the application for retirement benefits and did so based on an alleged physical disability.[31]

B. Judicial Review Of Disability Determinations Is Not Available Under The "*Scroggins* Formula"

Despite the unambiguous language of 5 U.S.C. 8347(c), petitioner argues (Pet. Br. 20) that judicial review of administrative decisions on the question of disability should be permitted under what he labels the "*Scroggins* standard." He relies on opinions of the Court of Claims holding

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[31] Petitioner's reliance (Pet. Br. 20) on *United States* v. *Clark*, 445 U.S. 23, 34 n.11 (1980), as supporting a right of judicial review is wholly misplaced. Petitioner asserts that the Court there held that the Court of Claims had jurisdiction to review the Civil Service Commission's interpretation of a statute that (petitioner states) concerned "dependency and live-in status," even though 5 U.S.C. 8347(c) bars judicial review of questions of "dependency" as well as "disability." This characterization of the issue in *Clark* is disingenuous. *Clark* involved only the construction of a live-in requirement as a prerequisite to the eligibility of an illegitimate child for survivors benefits. The "dependency" requirement had been deleted from the relevant statutory provision. See 445 U.S. at 29-32. *Clark* therefore did not involve a question of "dependency" within the meaning of 5 U.S.C. 8347(c). Section 8347(c) accordingly was not even cited in the Court's opinion or the parties' briefs. The footnote upon which petitioner relies addressed an unrelated question of Tucker Act jurisdiction raised by the United States with respect to the constitutional claim in the case. See U.S. Br. 17-24.

that judicial review of such decisions is available "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" See *Scroggins* v. *United States*, 397 F.2d 295, 297, cert. denied, 393 U.S. 952 (1968). The Federal Circuit in this case explicitly disavowed the *Scroggins* formula that had been employed by its predecessor court. See J.A. 50-52. Its decision to do so was entirely sound, because the *Scroggins* formula simply has no basis in the terms or purposes of the preclusion provision. Nor, in fact, did the Court of Claims ever purport to find such a basis or otherwise consider the matter in any depth. Instead, the Court of Claims adopted the quoted language from a prior decision of another court in which the statutory bar did not even apply, and then repeated the formulation in subsequent decisions without further analysis.

1. The language quoted above from *Scroggins* first appeared in a decision of the Court of Claims in *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, cert. denied, 371 U.S. 936 (1962). The court in *Gaines* lifted the language verbatim from the opinion of the District of Columbia Circuit in *Smith* v. *Dulles*, 236 F.2d 739, 742, cert. denied, 352 U.S. 955 (1956), which, like *Gaines* and *Scroggins*, was a case in which the employee had been retired involuntarily on the basis of a mental disability and the employee was seeking judicial review of that determination and an award of back pay. However, the decision in *Smith* v. *Dulles* was rendered prior to the enactment of the preclusion of review now contained in 5 U.S.C. 8347(c). See page 19 & note 28, *supra*. That statutory provision therefore did not apply in *Smith* v. *Dulles*, and the court in that case accordingly did not construe or even mention it. Instead, the language in *Smith* v. *Dulles* that was later adopted by the Court of Claims as the *Scroggins* formula was quoted directly from an earlier opinion of the District of Columbia Cir-

cuit that did not even involve the civil service retirement program. 236 F.2d at 742 & n.11, quoting *Powell* v. *Brannan*, 196 F.2d 871, 873 (1952).[32]

The Court of Claims in *Gaines* adopted the language from *Smith* v. *Dulles* without any apparent recognition that the preclusion of review did not apply in that case or that its intervening enactment had affected the authority of a court to review an administrative decision on a question of disability. 158 Ct. Cl. at 501-502. In *Scroggins*, however, unlike in *Gaines*, the Court of Claims did acknowledge that the statutory bar in 5 U.S.C. 8347 (c) "is a special and unusual restriction on judicial examination" (397 F.2d at 297). But it then quoted the language from *Gaines* and cited *Smith* v. *Dulles*, without acknowledging that *Gaines* had adopted the formulation from *Smith* v. *Dulles* even though that case was inapposite and that *Gaines* had, as a result, effectively ignored the statutory preclusion of judicial review on questions of disability. 397 F.2d at 297.

It was in this casual and unwitting manner that the "*Scroggins* formula"—drawn verbatim from *Gaines* and *Smith* v. *Dulles*, and ultimately from a District of Columbia Circuit case that did not even involve the civil service retirement program—was adopted by the Court of Claims as the appropriate standard of review in disability retirement cases. The net effect, of course, was to attach no significance whatever to the explicit statutory bar to judicial review. The *Scroggins* formula then was reiterated by the Court of Claims in a handful of subsequent civil

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[32] The court in *Smith* v. *Dulles*, 236 F.2d at 742 n.11, also cited the decision in *Dismuke* v. *United States* (discussed at pages 18-19, *supra*), in which this Court held that a denial of retirement benefits could be challenged in a suit under the Tucker Act. 297 U.S. at 172. However, *Dismuke*, which did not involve a claim based on disability, was decided well before enactment of the statutory preclusion of judicial review at issue here. Moreover, the Court in *Dismuke* acknowledged that Congress could "provide an administrative remedy and make it exclusive," but held that Congress had not then done so. *Id.* at 172-173.

service disability retirement cases without further analysis.[33] Because the Court of Claims had thus never actually considered the effect of the statutory preclusion of review in 5 U.S.C. 8347(c), the Federal Circuit in this case acted responsibly in reassessing the *Scroggins* formula.

2. The Federal Circuit also was correct in repudiating the *Scroggins* formula after reexamining the issue. The *Scroggins* formula—permitting a court to set aside an administrative decision on a question of disability "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination' "—simply has no basis in the text of 5 U.S.C. 8347(c). The quoted language describes a *standard* of judicial review and necessarily presumes that a court has authority to review the administrative action on the merits. And that is how the Court of Claims applied the standard in *Scroggins* and other disability cases. See cases cited in note 33, *supra*. Section 8347(c), however, bars a court even from inquiring into these matters. The Federal Circuit's construction, unlike the largely standardless *Scroggins* formula of the Court of Claims, is faithful to the text and purposes of 5 U.S.C. 8347(c).

Moreover, as Judge Nichols observed in his concurring opinion (J.A. 66-67), this Court's decision in *United States* v. *Erika, Inc.*, firmly supports the Federal Cir-

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[33] *McGlasson* v. *United States*, 397 F.2d 303, 306-307 (Ct. Cl. 1968) (plurality opinion); *id.* at 311 (Nichols, J., concurring); *id.* at 318 (Skelton, J., dissenting); *McFarland* v. *United States*, 517 F.2d 938, 942-943 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); *Allen* v. *United States*, 571 F.2d 14, 17 (Ct. Cl. 1978); *Fancher* v. *United States*, 588 F.2d 803, 806 (Ct. Cl. 1978); *Fitzgerald* v. *United States*, 623 F.2d 696, 699 (Ct. Cl. 1980). See also *Polos* v. *United States*, 621 F.2d 385, 392 (Ct. Cl. 1980). In only one of these cases did the Court of Claims actually grant relief (*Allen* v. *United States*), and its holding in that case was promptly overruled by the en banc court in *Polos* v. *United States*.

cuit's decision to abandon the *Scroggins* approach. The Court held in *Erika* that judicial review of benefit amount determinations under Part B of the Medicare Program is foreclosed, relying upon the fact that Congress had expressly provided in 42 U.S.C. 1395ff(b) for judicial review of administrative decisions denying claims for benefits under Part A of the Medicare Program but omitted any such provision under Part B. 456 U.S. at 206-208. In reaching this conclusion, the Court reversed the holding of the Court of Claims that this "implicit" preclusion of review under Part B of the Medicare Program barred judicial review only of factual determinations, not of statutory or procedural issues. *Erika, Inc.* v. *United States*, 634 F.2d 580, 585-586 (1980), rev'd, 456 U.S. 201, 205 (1982). Indeed, the Court of Claims in *Erika* had specifically relied on *Scroggins* and its progeny arising under the disability retirement program. See 634 F.2d at 587. This Court's unanimous reversal of the Court of Claims' holding in *Erika*—which concerned the scope of an *implicit* preclusion of review—fatally undermines the *Scroggins* rationale for avoiding the *explicit* preclusion of review of decisions on questions of disability under the civil service retirement law. See *Hackett* v. *OPM*, 721 F.2d 580, 582 (6th Cir. 1983) ("The *Scroggins* rule has been eroded considerably, if not completely by the decision in * * * *Erika*."); *Lancellotti* v. *OPM*, 704 F.2d 91, 97 n.10 (3d Cir. 1983) ("*Erika* thus casts considerable doubt on the continuing validity of *Scroggins* and its progeny.").

3. Finally, it is significant that the *Scroggins* formula had its origins and thereafter was applied principally in the narrow category of cases in which the agency, not the employee, filed the application for benefits based on the claimant's mental condition.[34] As the court of

[34] *Scroggins* itself and *Gaines* v. *United States* were such cases. So were *Smith* v. *Dulles* and its companion cases decided by the District of Columbia Circuit (*Murphy* v. *Wilson* and *Ellmore* v. *Burke*; note 11, *supra*), upon which the Court of Claims relied in

appeals observed (J.A. 52), the concern that apparently led to the Court of Claims' initial application of the *Scroggins* formula—"that administrators might unfairly force individuals from federal employment with an attached mental condition 'stigma' "—has now "been fully met by Congress's enactment of [5 U.S.C.] 8347(d)(2)," which expressly provides for judicial review in such cases pursuant to 5 U.S.C. 7703. Because Congress thus has addressed the question and fashioned an explicit exception to 5 U.S.C. 8347(c) for the circumstances in which it concluded that judicial review is warranted, the court below properly declined to continue to apply the judicially fashioned *Scroggins* formula in other circumstances for which Congress has not authorized an exception.

Petitioner contends (Pet. Br. 27, 30), however, that the legislative history of the 1980 amendments to 5 U.S.C. 8347 establishes a right of judicial review under the *Scroggins* formula. This contention is in error. The narrow focus of the 1980 amendments was on the perceived need to furnish a right of judicial review in the special situation involving agency-filed applications for retirement benefits based on the employee's mental condition. Congress did not purport to authorize or condone judicial review under the civil service disability retirement program generally. To the contrary, the Senate Report stated that the purpose of the amendments was "to provide an exception to the existing rule that disability decisions of the OPM are final and conclusive and not subject to review" (S. Rep. 96-1004, *supra*, at 3).

Scroggins and *Gaines*, as well as the Court of Claims' subsequent decisions in *McGlasson*, *McFarland* and *Fitzgerald* (note 33, *supra*), which were rendered in 1968, 1975 and 1980, respectively. Except for a passing reference in *Lech* v. *United States*, 409 F.2d 252, 255 (Ct. Cl. 1969), it was not until 1978 (in *Allen* v. *United States*; note 33, *supra*) that the Court of Claims invoked the *Scroggins* formula in a civil service retirement case that did not involve an agency-filed application based on mental disability. The Court of Claims did not discuss the different considerations raised in such a case.

See also *id.* at 2, 4-5; 126 Cong. Rec. 29700 (1980) (remarks of Sen. Pryor). The House Report similarly described the purpose of the amendments as being "to provide an exception to the general rule" in 5 U.S.C. 8347 (c). H.R. Rep. 96-1080, *supra*, at 5. See also *id.* at 2, 6, 8, 10. Representative Spellman, the sponsor of the measure, explained that "access to the courts" is not available to those employees at this time. 126 Cong. Rec. 14817 (1980). See also *id.* at 14815-14816 (remarks of Rep. Spellman); *id.* at 14816 (remarks of Rep. Corcoran).[35]

The House Report does discuss the Court of Claims' decisions in *Scroggins*, *McGlasson* and *McFarland*. H.R. Rep. 96-1080, *supra*, at 4.[36] But as noted above, all of these cases involved agency-filed applications based on the employee's mental condition. That was the precise subject matter addressed by the 1980 amendments, which supplanted the approach taken by *Scroggins* and its progeny in that category of cases. Congress did not address the broader question of judicial review of administrative decisions on questions of disability under the civil service retirement program generally. In fact, the House Committee revised an earlier proposal that would have repealed the preclusion of review in 5 U.S.C. 8347(c) and thus made judicial review available with regard to all disability decisions. See H.R. Rep. 96-1080, *supra*, at 8, 10.

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[35] See also *RFEHB Plan, Survivor Benefit, and Fitness-for-Duty Exams: Hearing on H.R. 2510, H.R. 5410, and S. 716 Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 1, 18, 20-21, 28, 30-33 (1979) [hereinafter cited as *Hearing*].

[36] See also *Hearing* 8, 11-12, 18, 20-21, 28; Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess., *Forced Retirement/Psychiatric Fitness for Duty Exams* 14-16, 19-20 (Comm. Print 1978).

As petitioner points out (Pet. Br. 27-28, 29), letters from the Director of OPM to the House and Senate Committees did state that expanded judicial review should be limited to involuntary retirements and that it was appropriate that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there had been a substantial procedural error, misconstruction of governing legislation, or some like error going to the heart of the administrative determination. H.R. Rep. 96-1080, *supra*, at 3-8; S. Rep. 96-1004, *supra*, at 4-5. But these statements are little more than a description of the *Scroggins* formula as it had been applied by the Court of Claims. They were not necessarily a defense of its correctness as a legal matter, as evidenced by the fact that the government was contending in litigation at approximately the same time that 5 U.S.C. 8347(c) completely bars review. See *Fancher* v. *United States*, 588 F.2d 803, 806 n.3 (Ct. Cl. 1978). Moreover, the focus of the Director's submission was on the new judicial review procedures, which he argued should not be applied in cases other than the involuntary mental disability cases that raised unique concerns.[37]

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[37] Another OPM witness stated that questions of proper procedure or constitutional issues could be taken to court and that only the question of disability, which he described as a "question of medical fact," is actually barred by 5 U.S.C. 8347(c). *Hearing* 4. But this passing statement, which is itself ambiguous, presumably was based on experience under the erroneous *Scroggins* formula. The witness's statement is also internally inconsistent. At the same page of his testimony, he described 5 U.S.C. 8347(c) as similar to the statutory preclusions of review under the veterans' benefits law and the Federal Employee Compensation Act, which expressly bar review on questions of law as well as fact. See pages 37-38, *supra*. Moreover, a Subcommittee Associate Staff Counsel stated that *Scroggins* and its progeny did bar review on procedural questions. *Hearing* 4. He also explained that the prior version of the bill that would have repealed the preclusion of review in 5 U.S.C. 8347(c) was intended to permit the Court of Claims to consider "due process" (*i.e.*, procedural) issues (*Hearing* 4, 20-21), thereby implying

Nor did Congress in 1980 actually reenact the entire sentence in 5 U.S.C. 8347(c) that contains the preclusion of review, such that Congress thereby could be thought to have incorporated a particular judicial construction of that clause. Compare *Lorillard* v. *Pons*, 424 U.S. 575, 580-581 (1978). Congress amended 5 U.S.C. 8347(c) only to insert at the beginning of that sentence the phrase: "Except to the extent provided under subsection (d) of this section * * *." 94 Stat. 2696. Thus, even if the legislative history reflected a belief by some Members of Congress that judicial review was available on questions of disability under the civil service retirement program generally, notwithstanding 5 U.S.C. 8347(c), Congress did nothing to enact that view into law. See J.A. 58-59. At most, such a view would be the interpretation by some Members of a subsequent Congress 24 years after enactment of the clause, which is entitled to little weight. See, *e.g.*, *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 116-120 (1980). In these circumstances, the Federal Circuit correctly declined to read the legislative history of the 1980 amendments as undermining the plain language of the statutory bar in 5 U.S.C. 8347(c).

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that 5 U.S.C. 8347(c) does bar review of procedural issues where, as here, that section applies. In short, no clear understanding of the meaning of 5 U.S.C. 8347(c) emerges from the legislative history of the 1980 amendments.

CONCLUSION

For the reasons stated in Point I, the judgment of the court of appeals should be vacated and the case remanded to the court of appeals with instructions to transfer the case to the Claims Court pursuant to 28 U.S.C. 1631. If the Court does not follow that course, the judgment of the court of appeals dismissing the appeal should be affirmed.

Respectfully submitted.

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IN THE

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Petitioner,

v.

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION OUT-OF-TIME FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR WILLARD BRONGER, FRANK KACPROWICZ AND ALBERT VEVERKA AS *AMICI CURIAE*

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MOTION OUT-OF-TIME FOR LEAVE TO FILE BRIEF AMICI CURIAE

NOW COME WILLARD BRONGER, FRANK KACPROWICZ, and ALBERT VEVERKA, by and through one of their attorneys, Max G. Brittain, Jr., and respectfully move this Court pursuant to Rule 42 of the Supreme Court Rules for leave to file a brief *amici curiae* in the above entitled case. The Petitioner has consented to allow said filing, while Respondent was asked but refused to give its consent.

INTEREST OF WILLARD BRONGER, FRANK KACPROWICZ AND ALBERT VEVERKA

Willard Bronger, Frank Kacprowicz and Albert Veverka are the three Petitioners in the case of *Bronger, et al. v. Office of Personnel Management,* 740 F.2d 1552 (Fed.Cir. 1984). They are former civilian air traffic controllers who were separated from their employment with the Department of Defense, but denied a retirement annuity because their time of service as military air traffic controllers was not credited. The initial denial of a retirement annuity by the Office of Personnel Management ("OPM") was upheld by the Merit Systems Protection Board ("MSPB"), and these three former federal employees then timely filed an appeal with the Court of Appeals for the Federal Circuit as directed by the MSPB. OPM, Respondent therein, then argued that said Court did not have jurisdiction to hear their appeal because they were not "employees" under 5 U.S.C. § 7703(a). On July 26, 1984, after Petitioner Lindahl's Brief had been filed with this Court, the Federal Circuit rendered its opinion in *Bronger, supra,* holding that it had jurisdiction and that the Petitioners should prevail on the merits. On October 16, 1984, Respondent OPM filed a Petition For Rehearing And Suggestion For Rehearing En Banc, and concurrently moved to stay proceedings pending this Court's decision in *Lindahl v. OPM,* 718 F.2d 391 (Fed. Cir. 1983) *cert. granted,* 52 U.S.L.W. 3906 (June 18, 1984). The Motion to Stay was summarily granted; Petitioners Bronger, Kacprowicz and Veverka have sinced moved to vacate said stay, but no decision has been rendered. Respondent did not, and has not, petitioned for writ of *certiorari* in *Bronger.*

The jurisdictional issue presented in *Bronger* was not an issue presented to this Court in *Lindahl* until OPM, respondent in both cases, sought (in its brief to this Court which was filed in September of 1984) to have this Court broaden its review to include the holding of the Federal Circuit in *Bronger. (See*

Brief of Respondent, pp. 12-13.) Accordingly, Messrs. Bronger, Kacprowicz and Veverka have been prejudiced by the Government's attempt to litigate their case without notice to them, and by being forced to rely on the necessarily limited effort of Mr. Lindahl to fully present their case, which is of only tangential interest to him, in a mere Reply Brief.

While it is true that this brief *amici curiae* is not timely pursuant to Rule 36 of the Supreme Court Rules, this is due solely to Respondent's unprecedented move in attempting to have this Court review and reverse a subsequent and broader decision of a lower court in the course of reviewing another case where *certiorari* had already been granted on a narrower question. There was no reason to expect that Messrs. Bronger, Kacprowicz and Veverka had an interest in the case of Mr. Lindahl until Respondent herein improperly attempted to broaden this case in its brief filed in September of 1984 (without notice to them), at which time it was already too late to proceed timely under Rule 36. Indeed, they had no notice of Respondent's intentions until October of 1984 when Respondent filed for rehearing and simultaneously sought a stay in their case in the Federal Circuit, where they had already prevailed. Respondent further compounded the prejudice by refusing to consent to their filing a brief *amici curiae* so that said circumstances could be more clearly outlined for this Court. Such unconventional, if not duplicitous, maneuvering on the part of the Respondent has necessitated this motion out-of-time.

CONCLUSION

For all the foregoing reasons, we respectfully urge this Court to grant this motion for leave to file the accompanying *amici* brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

MAX G. BRITTAIN, JR.
Counsel of Record

TERRILL E. PIERCE

Of Counsel
CARL H. DEBROUX

QUESTION PRESENTED

Whether this Court should decline Respondent's suggestion to enlarge the present case to include review of the holding in *Bronger v. Office of Personnel Management*, 740 F.2d 1552 (Fed. Cir. 1984), that nondisability civil service retirement claims can be appealed to the Court of Appeals for the Federal Circuit, and instead limit its holding to disability retirement cases such as that of Mr. Lindahl.

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR WILLARD BRONGER, FRANK KACPROWICZ, AND ALBERT VEVERKA AS *AMICI CURIAE*

Willard Bronger, Frank Kacprowicz, and Albert Veverka submit this brief *amici curiae* to urge that this Court decline Respondent's suggestion to broaden the issue presently pending before it to include the appeal rights of former employees in retirement cases not subject to 5 U.S.C. § 8347(c).

I.

INTEREST OF WILLARD BRONGER, FRANK KACPROWICZ AND ALBERT VEVERKA

Willard Bronger, Frank Kacprowicz and Albert Veverka are the three Petitioners in the case of *Bronger, et al. v. Office of Personnel Management,* 740 F.2d 1552 (Fed. Cir. 1984). They are former civilian air traffic controllers who were separated from their employment with the Department of Defense, but denied a retirement annuity because their time of service as military air traffic controllers was not credited. The initial denial of a retirement annuity by the Office of Personnel Management ("OPM") was upheld by the Merit Systems Protection Board ("MSPB"), and these three former federal employees then timely filed an appeal with the Court of Appeals for the Federal Circuit as directed by the MSPB. OPM, Respondent therein, then argued that said Court did not have jurisdiction to hear their appeal because they were not "employees" under 5 U.S.C. § 7703(a). On July 26, 1984, the Federal Circuit rendered its opinion in *Bronger, supra,* holding that it had jurisdiction and that the Petitioners should prevail on the merits. On October 16, 1984, Respondent OPM filed a Petition For Rehearing And Suggestion For Rehearing En Banc, and concurrently moved to stay proceedings pending this Court's decision in *Lindahl v. OPM,* 718 F.2d 391 (Fed. Cir. 1983) *cert. granted,* 52 U.S.L.W. 3906 (June 18, 1984). The Motion to Stay was summarily granted; Petitioners Bronger, Kacprowicz and Veverka have since moved to vacate said stay, but no decision has yet been rendered. Meanwhile, without notice to counsel for *Bronger,* Respondent filed its brief before this Court in *Lindahl,* and sought therein to have this Court review and reverse the jurisdictional issue of the *Bronger* decision. (Brief of Respondent, pp. 12-13).

Respondent's conduct in this regard has severely prejudiced the rights of Messrs. Bronger, Kacprowicz and Veverka in that it has effectively sought *ex parte* resolution of their

claims. Respondent failed to file a petition for writ of *certiorari* in *Bronger*, but nevertheless seeks this Court's review of the jurisdictional issues of said decision in its brief before this Court in *Lindahl*. It is for this reason that Messrs. Bronger, Kacprowicz and Veverka seek this Court's leave to participate before this Court as *amici curiae*.

II.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Federal Circuit in *Lindahl v. OPM, supra*, held that Lindahl was precluded by 5 U.S.C. § 8347(c) from judicial review of the Merit Systems Protection Board's affirmance of the Office of Personnel Management's decision that Lindahl was not entitled to a disability retirement annuity. It expressly declined to reach the issue of whether former employees denied a *non*disability retirement annuity by the OPM and affirmed by the MSPB could obtain judicial review. This question was reached in *Bronger v. OPM, supra*. The OPM improperly seeks review by this Court of the jurisdictional issue decided in *Bronger* even though no petition for writ of *certiorari* was filed therein, simply by so requesting in its brief on a different case, namely, *Lindahl*.

III.

ARGUMENT

The Issue In This Case Is Whether § 8347(c) Precludes Judicial Review

It is clear that the petition for *certiorari* in this case, and the Brief of the Petitioner which was filed with this Court prior to the decision of the Federal Circuit in *Bronger,* present only a narrow jurisdictional question, namely, whether the Court of Appeals for the Federal Circuit has jurisdiction to review decisions of the OPM and the MSPB with respect to nonfactual determinations in physical disability retirement cases.

The Petition for *certiorari* in *Lindahl* succinctly stated the issues for review as follows:

> Questions presented: (1) Does Article III court have jurisdiction to review final decision of MSPB where board action violated petitioner's constitutional right to due process, and Department of Navy violated petitioner's rights in discharging him? (2) Did Navy and MSPB violate petitioner's due process rights by discharging him from employment in violation of its regulation and by imposing burden of proof on him in violation of 5 USC 7701(c)?

52 U.S.L.W. 3925.

The Federal Circuit in its decision below concluded that judicial review of physical disability retirement claims is precluded by 5 U.S.C. § 8347(c). *Lindahl v. OPM, supra,* 718 F.2d at 393. The arguments why this conclusion is erroneous have been ably set forth by Petitioner Lindahl and the various *amici curiae* who have supported him. However, it simply cannot be disputed that the lower court's decision in *Lindahl* rested exclusively on the provisions of § 8347; indeed, it explicitly stated that it was not addressing the broader issue subsequently decided in *Bronger:*

> We decided here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an

> MSPB decision affirming the denial of a claim for annuity following a *voluntary physical disability* retirement, a decision reached by MSPB under the authority provided in it § 8347(d)(1).
>
> * * * *
>
> We need not, and hence do not, decide in this case whether all decisions of MSPB under § 8347(d)(1) are denied judicial review by § 8347(c) .... It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this court.

Lindahl v. OPM, 718 F.2d at 393, 399 (emphasis added). Such circumspection is only proper, as it is a well established and uniform course of appellate review procedure to decline to review questions not necessary to a decision by an appellate court. See, e.g., *Sun Insurance Office v. Scott*, 284 U.S. 177 (1931).

The Federal Circuit reiterated the narrowness of its holding in *Lindahl* when it decided *Bronger*. It commenced its *Bronger* opinion by quoting the first sentence above from *Lindahl* and emphasizing that "[t]his case therefore differs from, and is not controlled by *Lindahl*." 740 F.2d at 1554. Indeed, the differences between the two cases are the very reason that court held that it did not have jurisdiction to hear Lindahl's appeal, while it held that it did have jurisdiction over Bronger's appeal:

> [T]he statutory linchpin of *Lindahl*, the section 8347(c) "finality clause" which we held to bar judicial review in that case, applies only to "questions of disability ..." ... Recognizing that the *Lindahl* rationale does not expressly govern jurisdiction here, OPM advances an alternative argument which the Court in *Lindahl* found unnecessary to address.

Id. at 1554. This argument, that the court did not have jurisdiction to review appeals of persons not presently "employees or applicants for employment" under 7703(a), was rejected

as "border[ing] on the frivolous." 740 F.2d at 1555. It is obvious that Respondent herein, which is also the respondent in *Bronger,* does not agree with this holding. In such circumstances, it may, of course, petition this Court for *certiorari* in *Bronger* and this Court may then address whether it deems the case worthy of its discretionary review. Respondent has not done so. Instead, it has attempted to circumvent normal judicial procedure by seeking this Court's review of the *Bronger* holding through *Lindahl,* despite the fact that in the latter case the lower court expressly refused to reach the broader question of whether nondisability civil service retirement claims can be appealed to the Federal Circuit pursuant to 5 U.S.C. § 7703. The Brief of Respondent acknowledges that this question was not reached until *Bronger* was decided, but nevertheless it asserts that:

> Since the Court now has the benefit of the Court of Appeals views, there is no reason to postpone consideration of the [broader] jurisdictional issue, particularly since two other Court of Appeals have reached a contrary conclusion. *Lancellotti v. OPM,* 704 F.2d 91, 95-96 (3rd Cir. 1983); *Morgan v. OPM,* 675 F.2d 196, 198 (8th Cir. 1982).

(Resp. Br. pp. 12-13). To the contrary, however, there is every reason for this Court to postpone consideration of the broader issue, the most important of which is that this simply is not how our judicial system works. As a famous jurist once had occasion to note, "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau v. McDowell,* 256 U.S. 465, 476 (1921) (J. Brandeis). Respondent's action in this regard is inexplicable, and demonstrates a gross disregard for the normal processes of this Court. In addition, the "split" in the Circuits referred to by Respondent is a mere phantom. The two cases it cites are both *disability* retirement cases and therefore, as in the Federal Circuit's decision in *Lindahl,* the preclusive effect of § 8347(c) was the only issue necessary to be addressed.

The Court of Appeals for the Federal Circuit is the court endowed by Congress with "exclusive jurisdiction . . . of an appeal from a final order or final decision of the Merit Systems Protection Board pursuant to Sections 7703(b)(1) and 7703(d) of title 5". 28 U.S.C § 1295(a)(9). That Court ruled that it had jurisdiction over an appeal by former federal employees from a final order of the MSPB denying an early retirement annuity. *Bronger, supra.* Furthermore, this decision was not rendered until several months after this Court granted *certiorari* in the instant case. Unless and until *Bronger* (or a subsequent case with the same holding) is appealed to this Court, that decision is the law, and even the Government must abide by it. It is submitted that Respondent's approach is disingenuous at best.

Should this Court decide that the lower court erred in holding that § 8347(c) precluded Lindahl from any judicial review of MSPB's denial of his claim for a disability annuity, then this case should be remanded to the Federal Circuit for resolution of all issues not previously addressed. This is the normal procedure; one which has allowed for certainty in the potential disposition of claims. This Court has traditionally been loath to unnecessarily broaden the scope of its pronouncements, at least in part to avoid that which can result when the ramifications and consequences of a particular question have not been fully explored. Such is the case here. The broader question presented in *Bronger* has been only tangentially addressed in the briefs of the parties, and their respective *amici curiae.* There is absolutely no reason why this Court need heedlessly embark into uncharted waters. Respondent's hapless suggestion that this Court do so should be roundly rejected.

CONCLUSION

For all of the foregoing reasons, this Court should decline Respondent's suggestion to broaden the issue in this case, and limit its holding to disability retirement cases such as that of Mr. Lindahl.

Respectfully submitted,

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Counsel of Record

TERRILL E. PIERCE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Margaret Cheeseman, Marie Zagorny, Chong C. Brown, Alan Speek, Irving Saginor, Amalia Meierdiercks, Patricia Schroeder and Mary Rose Oakar, by and through their attorney, Edith U. Fierst, respectfully move this Court pursuant to Rule 42 of the Supreme Court Rules for leave to file a brief *amici curiae* in the above entitled case. Petitioner has consented to allow said filing, but Respondent has declined to consent.

Most of the *Amici* are petitioners in cases pending before the Court of Appeals for the Federal Circuit which have been (or soon will be) stayed pending a decision by the Supreme Court in *Lindahl v. OPM*, 718 F.2d 391 (Fed. Cir. 1983), cert. granted, 52 U.S.L.W. 3906 (U.S. June 18, 1984) (No. 83-5954). The possibility of their

obtaining judicial review of their respective cases may depend upon a favorable ruling by the Court in this case.

The remaining *Amici* are Members of Congress.

The jurisdictional issues presented by movants were not before this Court in *Lindahl* until the Government sought in its reply brief to broaden the issues beyond those decided by the Federal Circuit or raised in Petitioner's brief. Prior to that date, the dispute in *Lindahl* was restricted to the right of an applicant for disability retirement to obtain judicial review by the Court of Appeals for the Federal Circuit of the denial of his claim. Specifically the issue was whether section 8347(c) of title 5 U.S.C. precludes review of any aspect of the denial of such claim, as held by the Federal Circuit, or alternatively whether it bars that Court from reviewing only a decision on the facts of the alleged disability.

The Government's reply brief raised several entirely new questions, including whether judicial review is also barred when the applicant is seeking retirement benefits other than disability benefits, whether review by the Federal Circuit is separately barred when the claimant is a retired Federal employee, whether such review is precluded when the claimant is the surviving spouse of a Federal employee, and whether the proper forum in all such cases is the Claims Court.

These questions are of critical importance to movants whose petition before the Federal Circuit has been stayed, and whose right to be heard on appeal may depend upon the decision of this Court. These movants have been badly prejudiced by the Government's request that this Court rule adversely to them without giving them notice or an opportunity to present their views.

While it is true that this brief *amici curiae* is not timely pursuant to Rule 36 of the Supreme Court rules,

this untimeliness is of Respondent's making.* There was no reason for movants to know they had an interest in the case of Mr. Lindahl until Respondent herein attempted to broaden the issues in its brief, at which time it was already too late to proceed timely under Rule 36.

CONCLUSION

For all the foregoing reasons, I respectfully urge this Court to grant this motion for leave to file the accompanying *amici* brief in the present case in support of the position of movants.

Respectfully submitted,

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---

* Respondent neither served nor furnished a copy of its brief to petitioners, thereby causing another week to be lost.

QUESTION PRESENTED

1. Whether the Court of Appeals for the Federal Circuit has jurisdiction over retirement cases, and if so whether this jurisdiction can be invoked on the petition of retired employees or their survivors.

2. Whether the Claims Court is the proper forum for appeals from the Merit Systems Protection Board in retirement cases.

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BRIEF ON BEHALF OF PETITIONERS IN 5 CASES PENDING BEFORE THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT, MARY ROSE OAKAR, MEMBER OF CONGRESS, AND PATRICIA SCHROEDER, MEMBER OF CONGRESS, AS AMICI CURIAE

INTEREST OF AMICI CURIAE

Most of the *Amici* are petitioners in cases pending before the Court of Appeals for the Federal Circuit which have been (or soon will be) stayed pending a decision by the Supreme Court in *Lindahl.* The possibility of their obtaining judicial review of their respective cases may depend upon a favorable ruling by the Court in this case.

The remaining *Amici* are Members of Congress. Mary Rose Oakar is Chair of the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service. Patricia Schroeder is Chair

of the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service. Both are deeply concerned that as a result of this case judicial review may be cut off from members of the Civil Service with respect to their retirement rights. Both see the protection of these rights as vital to the persons and issues with the charge of their respective Subcomittees.

STATEMENT

On October 10, 1984, the Department of Justice filed a motion to stay proceedings in the case of *Cheeseman and Zagorny* (on behalf of themselves and others similarly situated) *v. OPM*, Nos. 08318310675 and DC08318310909 (MSPB June 5, 1984), *appeal docketed* No. 84-1675 (Fed. Cir.) which is pending in the Court of Appeals for the Federal Circuit. It asked for the proceedings to be delayed pending a decision in *Lindahl v. OPM*, 718 F.2d 391 (Fed. Cir. 1983) on which *cert.* had been granted. Shortly thereafter the Justice Department filed similar motions to stay proceedings in three other cases (*Brown v. OPM*, No. 831L8310837 (MSPB July 7, 1984), *appeal docketed* (Fed. Cir.) 84-1743; *Speek v. OPM*, No. SF 08318310957 (MSPB July 6, 1984), and *Saginor v. OPM*, No. DC08318410331 (MSPB July 9, 1984), *appeal docketed*, 84-1743. All of these cases have now been stayed.

At least one additional case now pending in the Federal Circuit will almost certainly be stayed as soon after docketing as feasible. That case is *Amalia Meierdiercks v. OPM*, No. 08318410132 (MSBP Sept. 27, 1984), *appealed but not yet docketed* (Fed. Cir.).

These cases involve the following facts and issues.

1. *Cheeseman and Zagorny v. OPM, supra.* This case arose because OPM failed to change the application for retirement when 5 USC 8339(j) was amended in 1974. Under the previous law, the annuity payable to a retiree who elected a survivor annuity was permanently reduced.

The 1974 amendment (Pub. L. 93-474) provided for the reduction to cease when the marriage terminates by death, divorce or annulment. As the result of litigation which began in 1981, OPM revised its application form, and notified all persons who had retired in the interim and elected less than the maximum survivor annuity, or their survivors, that the retiree had been misinformed and they could change the election, providing they could show that the misinformation was a primary cause of retiree's decision not to provide a survivor annuity. So far over 1400 individuals have made such a showing to the satisfaction of OPM, and been assured either that their spouses will be protected after the death of the retiree, or if that death has already occurred, that they are eligible to receive survivor annuities (including back payments to the date of death of the retiree). The remaining issues are (1) whether the MSPB was right in putting the burden of proving that a deceased employee was primarily influenced by the application form's misinformation on the employee's widow(er), or should have put it on the Government to prove that he or she was not so influenced; and (2) whether the MSPB was right in holding that it lacks authority to award an attorney's fee in this case because it lacks such authority in disability retirement cases.

2. *Saginor v. OPM, supra.* This case was filed on behalf of a retired employee who tried to change his survivor annuity election as part of the *Cheeseman and Zagorny* class. His application was refused, apparently because he was not married when he filled out the application form with the misleading information, although he was contemplating the marriage which occurred shortly thereafter. The issue is whether he has a right to show that he was primarily influenced by the application form's misinformation when he failed to make a timely election to provide a survivor annuity for his wife.

3. In *Speek v. OPM, supra*, a retired employee who was divorced and remarried seeks to assure survivor protection for his second wife. OPM was required to notify him of a change in the law making his provision of a survivor annuity for his second wife contingent upon his requesting such coverage within one year of that marriage. Mr. Speek denies that he received the required notice. During the period before he notified the Government of the remarriage, Mr. Speek's annuity continued to be reduced to pay for a survivor annuity. The question is whether the holding of the Merit Systems Protection Board that Mr. Speeks received timely notice of the change in the law was unsupported by the evidence and therefore that its refusal to allow him to elect a survivor annuity for his wife was arbitrary and capricious under the circumstances.

4. In *Brown v. OPM, supra*, the Civilian Personnel Office in Korea denied a retired employee the opportunity to elect a survivor annuity for the wife he married after retirement, stating that he was ineligible until he had been married two years. The employee lived in Seoul and had previously worked there for the Defense Department. There is evidence that the employee of the Civilian Personnel Office who refused his application was relying on outdated issuances of OPM. Before he died, the retired employee learned that he had been misled and that in fact it was necessary for him to make the election within one year. He tried to rectify the error, but his application was rejected as not timely because more than a year had elapsed. The petitioner is the widow on whose behalf he tried to obtain a survivor annuity. The question is whether the MSPB was right in holding that although the Government provided wrong information to its retired employee on which he had no alternative but to rely, it can nevertheless deny him and his surviving spouse the benefits which they have would have obtained absent the Government's wrongful conduct.

5. In *Meierdiercks v. OPM, supra,* the application of the surviving widow of a retired employee who is part of the *Cheeseman, Zagorny* class was denied on the ground that the burden of proof is on her to show that the primary cause of her husband's election was the misinformation on the application form. There are two issues, (1) whether the burden of proof is properly on Mrs. Meierdiercks: and (2) whether the MSPB was correct in failing to review the merits of her claim that she had met the burden.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below held that it lacked jurisdiction to review a decision of the Merit Systems Protection Board (MSPB) regarding a disability retirement, both the fact of the alleged disability and the standards followed by the MSPB in reaching its decision. In its reply brief Respondent argued that the above Federal Circuit coverage is unavailable not only with respect to disability retirements, but also with respect to retirement based on age and service. It further argued that the Federal Circuit has no jurisdiction to hear appeals brought by persons who have retired and are, therefore, no longer employed by the Federal Government, or by their surviving spouses because they are not and never were employees. Finally Respondent argued that the proper forum for appeals on these issues by these persons is the Claims Court.

The Respondent's brief is wrong because the special prohibitions placed on disability retirement do not apply to retirement for age and service. A decision to exclude age and service retirements from appellate review by the Federal Circuit would affect many more persons than would one regarding disability retirement, and would wreak havoc on the administration of justice. Such a decision should not be treated as an incidental concomitant of the law on disability retirement.

Specific statutory authority gives the Federal Circuit jurisdiction to hear retirement cases based on age and service. 5 U.S.C. 7701(a)(1) gives the MSPB express authority to hear cases that are appealable under any rule or regulation. MSPB regulations (5 CFR 1201.3 (a)(6)) provide authority for the MSPB to hear retirement cases. Section 7703(a)(1) authorizes the Federal Circuit to hear appeals from anyone adversely affected by an MSPB decision. Arguments for a contrary result are based on arcane readings of the statute and legislative history; they are unreasonable.

The same unreasonableness is true of arguments based upon the presumed intention of Congress to treat voluntary retirements differently from involuntary; frequently it is unclear whether a particular retirement is voluntary or unvoluntary. In the case of the surviving spouse of an employee who dies in service, there is no basis for assuming voluntariness (unless the employee committed suicide.) Moreover, despite the Government's argument that Congress deemed it inappropriate for the Federal Circuit to hear retirement claims because they are not in the nature of adverse actions, many retirement claims, including those of all movants who are petitioners in the Federal Circuit, involve actions initiated by the Government adverse to petitioners.

The Federal Circuit in *Bronger v. OPM*, Appeal Nos. 1349, 1350, 1376, slip op. (Fed. Cir. July 26, 1984) held that an employee does not lose entitlement to appeal because he has retired. This decision is correct, and should be sustained.

Similarly a survivor has the right to appeal: Section 12-101 of the D.C. Code provides that the right of action of a retired employee survives his death. Both statutory and case law substantiate the claim of the surviving spouse to be the legal representative.

The Claims Court cannot be deemed a substitute forum. Its jurisdiction is not appellate, but trial. To give it jurisdiction over retirement cases would thwart the Congressional policy of fostering uniform treatment of similar situations. Great harm not intended by Congress would be done to many potential appellants from decisions of the MSPB if recourse to the Claims Court were the only forum where they could obtain a hearing.

ARGUMENT

I. Retirement for Age and Service Is Very Different From Disability Retirement.

Petitioners in cases stayed by the Federal Circuit are seeking retirement or survivor annuities based on age and service, not disability.

Disability retirement is very different from ordinary retirement at the appropriate age and after the required service. This difference exists both as to eligibility requirements and under the jurisdictional provisions of title 5 of the United States Code.

First as to eligibility requirements: Entitlement to disability retirement depends upon a showing that the applicant is disabled. Someone must weigh the evidence and make this decision. Congress has vested that authority in the Office of Personnel Management (OPM) and the MSPB. The burden of proving disability has been placed upon the applicant who is seeking this special benefit. (*Chavez v. OPM*, 6 MSPB 343, 1981).

By contrast, retirement for age and service is a matter of right. No discretion needs to be exercised by anyone. The only issue is one of bookkeeping: does the applicant indeed have the requisite age and service? If the answer is that he or she does, the burden must be on the Government if it seeks to withhold such payments to explain why.

The jurisdictional provisions of title 5 take account of the difference in the two types of benefits by providing in pertinent part in section 8347(c).[1] "The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive, and are not subject to review."

The exact meaning of that provision is in controversy in the *Lindahl* case. It is beyond dispute, however, that the quoted language has no direct bearing on cases where a question of disability or dependency[2] does not exist.

II. Coverage of Retirement Cases Involves Serious Questions of Access to and Administration of Justice.

The right to appeal with respect to retirement involves many more individuals than does a decision on jurisdiction over disability. This issue should not be treated as an appendage of disability retirement, which occurs far less frequently.

The ramifications of a decision denying appellate rights in retirement cases would be broad beyond imagination. The potential variety of cases is as great as life itself.

Petitioners on this amicus brief have a diversity of situations requiring judicial review. Beyond doubt there is a multitude of other such issues involving many other petitioners, and potential petitioners.

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[1] All section references are to title 5 U.S.C. unless otherwise indicated.

[2] For purposes of this statute, dependency appears to mean an inability to be self-supporting. There is no indication that it refers to the status of a homemaking wife as the dependent of an employee. Payment of a survivor annuity to a widow or widower is not at all contingent upon a showing that the widow(er) was dependent upon the employee.

Recourse, and clarity about the method of obtaining such recourse, are needed. The difficulty of drawing the line to deny access to judicial review to some petitioners, and provide it to others, can be demonstrated by the issue of whether to hear active employees who have questions regarding retirement rights. Could they appeal?

If active employees can be heard by the Federal Circuit, but retirees who seek to raise the identical legal issue cannot be heard, the likelihood of a double standard of justice and consequent great confusion looms large.

The same result would follow from the Government's proposed denial of jurisdiction over any retirement issue, no matter by whom raised (Brief of Respondent, 24), because of the interrelationship between retirement rights and other employee rights and benefits. For example, the definition of service raised in the *Bronger* case (Slip op. at 12-15) may have other applications. The law regarding labor-management relations permits collective bargaining about conditions of employment, presumably including some retirement issues. (5 U.S.C. § 7103) An adverse action can lead to a reduction in retirement pay (Section 7512). Health benefits are available to annuitants on a basis similar to that applicable to employees (Section 8905). No doubt there are numerous other examples. The Government's position would create uncertainty about the forum where these issues will be decided, and the probability that the decisions of different forums will not be uniform.

The extent to which the Government's arguments lead into unexpected and perilous ground can be illustrated by the decision of the MSPB in *Cheeseman and Zagorny v. OPM*, *supra* that it lacks jurisdiction to award attorney's fees in retirement cases, although these are authorized under section 7701(g)(1). If this ruling is allowed to stand, it will deprive many widows of legal

assistance they cannot afford to purchase. In the *Cheeseman* class action, for example, many class members are widows without other retirement income (Federal employment until recently provided no coverage under Social Security). Many live on SSI. Nothing in the legislative history has been cited to suggest that Congress intended their cases to be conducted at their own expense or not at all. It is hard to believe that Congress intended to exclude this class of needy plaintiffs from the protection of section 7701(g)(1) which authorizes the Board to provide payment of reasonable attorney fees to the prevailing party if "warranted in the interest of justice." But such an outcome appears to the Merit Systems Protection Board to be the consequence of the Government's position.[3]

III. The Federal Circuit has Jurisdiction to Hear Cases Involving Claims for Non-Disability Retirement.

The statutory language makes the conclusion inescapable that Congress intended the Federal Circuit to have jurisdiction over retirement cases that do not involve disability or dependency.

Specifically section 7701(a)(1) provides that "an employee or applicant for employment may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board *under any law, rule or regulation.*" (Emphasis supplied).

MSPB regulation section 1201.3(a)(5) of 5 CFR (initially published at 44 FR 38349, June 29, 1979) provides that the Board's appellate jurisdiction includes "Determinations relating to disability retirement, health insurance and annuities."

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[3] Presumably the Government would have the MSPB make the same decision regarding the surviving children of Government employees, making this case one of the most egregious assaults on widows and orphans since the days of the Robber Barons.

Under section 7703(a)(1), because the Board has this jurisdiction, so does the Court. That section of the statute provides that an employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

A. *The physical disability exception has no relevance to non-disability retirement.*

Excepted from the jurisdiction of the Federal Circuit by section 8347(d) are "questions of disability and dependency", other than those involving mental disability. The holding of the *Lindahl* court was that section 8347 (c) should be construed to exclude from the jurisdiction of the Federal Circuit all aspects of physical disability retirement, not only findings of fact regarding the claimants' disability. This interpretation is properly before the Supreme Court. (Brief of Petitioner and of Respondent, as well as several *amici*).

In addition, however, the Government argues that the statute should be construed to preclude jurisdiction in the Federal Circuit over all types of retirement, not only disability retirement. (B. of Resp. 20, 21). This conclusion does not follow from the statutory language.

B. *The Government's Argument is at Variance with Common Sense.*

The Government's argument is long, complicated by arcane constructions, and heavy with legislative history, but it ignores the plain words of the relevant statutes, and the reliance that Members of Congress, in the rush of their multitudinous duties, are likely to place on the simple meaning, rather than the strained and complex construction that only a legal scholar can follow.

For example, the Government argues that because the exception in section 8347(d)(2) to the bar against review of questions of disability or dependency in 8347(c)

authorizes judicial appeal on a finding of mental disability, there is an implication that no other retirement question can be appealed.[4] This reading ignores the ordinary meaning of the words involved, and flies directly in the face of the language of section 7703 which provides that any action appealable to the Board may be appealed to the Federal Circuit.

The common understanding is that the Board is authorized to hear appeals on retirement cases. This was true prior to enactment of section 8347(d)(2) in 1980, and remains true today. Numerous cases have been heard by the Board under that authority, including the various cases brought by the petitioners.

To the extent that the Government's argument is based upon the wording of a 1980 Congressional Act to provide coverage for mental disability cases, it suggests that Congress intended thereby to eliminate appellate review for a very large class of Federal employees without debating this intent. This argument lacks reasonableness. Members of Congress must be assumed to have given the normal reading to the proposal before them, which was merely to authorize review of a factual determination that an employee (including one who has retired from the Federal service) suffers from a mental condition. If Congress had decided in 1980 to eliminate the right to appellate review for a large class of Federal employees, Congress would have written in plain English that this change had taken place.

C. *Voluntariness is not a workable criterion for appellate review.*

Advocates of the Government's position argue that its view is sensible because Congress wanted to distinguish between voluntary and involuntary claims for retire-

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[4] Brief of Respondent, 20 and 21.

ment.[5] This line of reasoning cannot withstand analysis. Who knows what the dynamics of a particular situation are with sufficient clarity to determine before hearing the facts whether the retirement was voluntary or involuntary? Many persons are forced into retirement each year because their jobs are abolished or because they know that if they do not retire they will be discharged. Many others choose retirement in lieu of accepting downgrading or transfer across the country. Are these retirements voluntary or involuntary? A decision to classify a retirement improperly risks unequal treatment of similarly situated persons.

Moreover even if all retirements were presumed to be voluntary, it would be completely unreasonable to make a presumption of voluntariness about death in service (other than the occasional suicide). There are many thousands of such cases; the law is clear that the surviving spouse is entitled to a benefit provided certain threshold standards are met.[6] Is the widow(er) to be deprived of a right to appeal to the court because some applicants for disability retirement act voluntarily?

The arguments made by some of those who would deprive petitioners of the right to appeal to the Federal Circuit ignore the statutory words "disability and dependency" in section 8347(c). See, for example, the decision of the MSPB in *Cheeseman and Zagorny v. OPM*, *supra*, in which the Board cited an earlier Federal Circuit case, *Williams v. OPM*, 718 F.2d 1553 (Fed. Cir. 1983) as authority for denying attorney fees in a non-disability case. The Board explained that although the *Williams* case "relates specifically to physical disability retirement appeals, appellants have pointed to nothing

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[5] See, for example, Judge Nies' dissent to *Bronger*, Slip op. at 3 and 4, or the conceptually similar argument made by Respondent (Brief, 40) regarding appeals closely resembling adverse actions, discussed *infra* pp. 14 and 15).

[6] 5 U.S.C. 8341.

which would render this analysis inapplicable to cases involving other retirement issues, and we have not found any appropriate distinctions." *Cheeseman, supra* at page 11. To the same effect is the reasoning of Judge Nies in her dissent to *Gilman v. OPM*, No. 84-764, slip op. (Fed. Cir. Sept. 12, 1984) where she says "In my view, a decision by the MSPB on a claim for benefits under section 8347(d)(1) is not reviewable by this court unless the claim comes within section 8347(d)(2) [relating to mental disability]".

IV. A Retired Employee is an Employee for Purposes of Sections 7701(a)(1) and 7703(a)(1).

Despite the statutory language specifying that an appeal must be brought by "an employee or applicant for employment," the Federal Circuit has already decided, properly, in *Bronger v. OPM*, Appeal Nos. 83-1349, 1350, 1376, slip op. (Fed. Cir. July 26, 1984) that an employee does not lose entitlement to appeal when he or she retires. The reasons stated by the court in its opinion are reasonable and correct.

In particular the *Bronger* court pointed out that cases involving adverse actions are sometimes brought by persons who are no longer employees as a consequence of the very adverse action that is challenged. The court noted that an interpretation that limited the court's jurisdiction to current employees would deprive it of a major portion of the jurisdiction which it exercises every day. *Id.* at 10 and 11. The Government doesn't like this idea, and tried to show that it is illogical by stating that an individual doesn't lose his right of appeal if he is deprived of status as an employee while seeking review of the adverse action. (Brief of Respondent, 24). But what about an individual who doesn't file until he has been terminated? The brief is silent.

The logic of the Government's position is that such a former employee would have no right to appeal to the Federal Circuit. If this were the rule, the race to the

lawyer's office would begin the minute any employee had reason to think he might be fired. Conversely, the Supervisor would be under pressure to hasten to discharge anyone whose appeal he feared. It would be nonsensical to suppose Congress wanted such a system.

Moreover, if the Court issues a jurisdictional ruling requiring such a bifurcation of authority over discharge cases, the Congressional purpose of achieving a system that will provide "quick and definitive answers to legal questions of nationwide significance" (S. Rep. 97-275, 97th Cong., 1st Sess., 1981, [hereinafter cited as Senate Report], p. 13.) will be thwarted.

The Government assumes wrongly that retirement cases do not involve events closely resembling adverse actions. (Brief of Respondent, 40). In fact all of the petitioners' cases and *Bronger, supra*, involve actions adverse to petitioners which were initiated by the Government. In the *Cheeseman and Zagorny* class action, that adverse action was the use of an application form for retirees which misled them into electing not to provide a survivor annuity. The application form also is the underlying factor in *Saginor* and *Meierdiercks*. In both *Bronger* and *Brown* the adverse action consisted of a Government official giving wrong information to a former employee regarding his employment rights, which led the former employee to act to his detriment. In *Speek* the adverse action was the failure of the Government to give Speek notice that he could not rely on the law as it was when he retired, but must provide OPM notice of his new marriage.

A more reasonable interpretation of Congressional intent is that the reference to an employee or applicant for employment was intended to describe generally what the relevant chapters of title 5 cover. These are rights of employees and applicants for employment, not the rights of the general public with respect to contracts, torts, the environment, criminal law, foreign policy, and

so forth. None of these other matters can be brought before the MSPB, and if they come before the Federal Circuit, it is because there is separate authority. But issues relating to the rights of employees, including retired employees, are covered by title 5 U.S.C., and such matters may be heard by the Board and on appeal from it by the Federal Circuit.

V. The Right of Action of a Retired Employee Survives His or Her Death, and the Surviving Spouse is Entitled to be Heard on Appeal.

The right of action to obtain a survivor annuity survives the death of the retired employee. The right of appeal of an employee under Section 7703 survives his or her death.

Section 12-101 of the D.C. Code provides:

> On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action, for all such cases, survives in favor of or against the legal representative of the deceased.

This statute governs an action against the Office of Personnel Management which is located in the District of Columbia. Further "the District of Columbia law of survival of action was enacted by Congress pursuant to its constitutional power and responsibility to exercise exclusive legislation in all Cases whatsoever over . . . the Seat of Government of the United States'. U.S. Const. Art. I, sec 8, cl. 17," as cited by Judge Louis Oberdorfer in *In Re Air Crash Disaster Near Saigon, Etc.* (476 F. Supp. 521, 527 (D.C. 1979).

The term "legal representative" in Section 12-101 of the D.C. Code is not limited to a duly appointed executor or administrator but includes "any person who, whether by virtue of testamentary act or operation of law, stands in the place of the decedent with respect to his property . . ." *Strother v. District of Columbia* 372 A2d 1291,

1296 (D.C. App. 1977). It is plain that the surviving spouse would qualify under the D.C. statute and could bring this appeal.

While not all the claimants in petitioners' cases are located in the District of Columbia, many are. It is inconceivable that Congress intended to have the right of appeal vary according to the jurisdiction in which the claimant resides. Instead there must be a uniform rule of law.

Judge Oberdorfer has provided another reason why the law of the District of Columbia is the appropriate one:

> Because of the national interests at stake here, the law of the forum, which is the law enacted by Congress for the Seat of the Government, should be displaced only if some other jurisdiction has an overwhelming policy interest in applying its own law. See *In re Paris Air Crash*, 399 F. Supp. 732, 745 (C.D. Calif. 1975). *Id.* at 527.

The surviving spouse not only inherits the right but also clearly could be substituted in this action and appeal. Section 12-102 of the D.C. Code makes the Federal Rules of Civil Procedure applicable to determining the substitution of parties in civil actions in the District. Under Rule 25 of the Federal rules, the court may allow substitution. In cases where the party in interest is the surviving spouse, there seems little doubt that the court would recognize the widow(er) as the substitute party. Indeed by entertaining appeals from surviving spouses, the MSPB has already done so.

VI. The Claims Court is not an Alternative Forum.

The Government's brief contained the following statement in footnote 15:

> We concede that the Claims Court does have jurisdiction to review the MSPB's decision in a retirement case in a suit under the Tucker Act (except as barred by 5 U.S.C. 8347)

The statement is offered as part of the Government's challenge to the Federal Circuit's reasoning in *Bronger supra*, that there is a presumption in favor of judicial review.

Without some statutory basis, however, the Claims Court may refuse to act upon the Justice Department concession that it has jurisdiction to hear appeals in retirement cases.

A. *There is no Statutory Basis for Appellate Review in the Claims Court.*

All appellate jurisdiction over the Merit Systems Protection Board is vested in the Court of Appeals for the Federal Circuit.[7] The Claims Court is a trial court only. The Tucker Act[8] cited by the Government in its brief does not provide a right of appeal, but rather a right of action in the first instance.[9]

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[7] Section 7703(b)(1) of 5 U.S.C., as amended in 1982 by the Federal Courts Improvement Act (Pub. L. 97-164), provides that a petition to review a final order or final decision of the Merit Systems Protection Board shall be filed in the United States Court of Appeals for the Federal Circuit.

The basis for this statutory language is section 1295 of Federal Courts Improvement Act which gives the Court of Appeals for the Federal Circuit *exclusive* jurisdiction to hear an appeal from the Merit Systems Protection Board pursuant to sections 7703 (b)(1) and 7703(d). The other section, 7703(d), relates to the circumstances under which the Director of the Office of Personnel Management is authorized to seek review of a final order of the MSPB in the Federal Circuit. Neither of these two sections cited in the Federal Court Improvements Act provides for appeals to the Claims Court.

[8] 28 U.S.C. § 1346(a)(2), § 1491(a)(1) (1982).

[9] At an earlier phase of *Cheeseman and Zagorny v. OPM, supra* the District Court for the District of Columbia refused on motion from the same Justice Department that now urges the District Court as the proper forum to hear petitioners arguments that they had been misled by the retirement application form and were therefore entitled to provide or receive survivor benefits on the ground that there had been no exhaustion of administrative remedies,

The legislative history of the Federal Courts Improvement Act is to the same effect.[10] Finding trial jurisdic-

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AFGE v. Devine, No. 82-3391, slip op. (D.C. 1983) at 7-9, thereby showing that the Justice Department then shared the common understanding that the procedures of the Merit Systems Protection Board were mandatorily applicable.

Specifically the Court said:

> With regard to defendant's motion to dismiss, the Court has accepted plaintiffs' allegations as true and has drawn all reasonable inferences in a light favorable to the plaintiffs as it must on a motion to dismiss. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The Court, however, cannot avoid the fact that a decision by the Court on claims that have not yet been reviewed administratively on a class-wide or an individual basis would violate the administrative procedure outlined in 5 U.S.C. Sec. 8347.
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> The Merit Systems Protection Board is by statute authorized to decide appeals from decisions on applications for reconsideration. It has already actually considered an appeal on the remaining principal issue in this case by a retiree who claimed he had been misinformed by the BRI Form 46-370. *Doyle v. Office of Personnel Management*, DC 08318110491 (July 30, 1981). The MSPB can, as well, consider the adequacy of those forms as they are challenged in the context of this suit. Indeed the plaintiff in *Devine I* specifically reserved the right to file a class action with the MSPB.
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> Plaintiffs allege that the Board's backlog will prevent a timely determination of the rights of retirees, some of whom are quite aged and infirm. While the facts of this case clearly illustrate the troubling effects of following an administrative procedure and the risk in its inherent delay, it does not follow that the requirement of exhausting those administrative remedies should be discharged or avoided. The administrative process must be completed before judicial review is appropriate.

[10] The Senate Report states that the Federal Circuit "inherits, in *appellate form*, substantially all of the jurisdiction of the two courts abolished in the merger" (Emphasis supplied). Senate Report, p. 3. (The two courts are the Court of Claims and the Court of Customs and Patent Appeals). Later it stated that "the Claims Court inherits substantially all the *trial jurisdiction* of the Court of Claims which under present practice is exercised largely by the

tion in the Claims Court would mean *de novo* hearings without regard to prior proceedings in the MSPB, a redundant and unnecessary procedure.

The Justice Department does not say why it believes there is a right of review in the Claims Court over decisions of the Merit Systems Protection Board, or why it conceded that authority (other than the hope of defeating any right of appeal in the Federal Circuit).

B. *Congress had No Reason to Give Appellate Jurisdiction to the Claims Court.*

It would be out of keeping with the stated intention of Congress in enacting the Federal Courts Improvement Act to give appellate jurisdiction over retirement cases to the Claims Court.

Specifically the Senate Report to that statute states that the new court is designed to "provide reasonably quick and definitive answers to legal questions of nationwide significance." The report further states that because all appeals will be to the Federal Circuit, the Federal judicial system will avoid the uneven application of the law when faced with the facts of individual cases. Senate Report *supra* at 3.

This purpose would be thwarted if matters involving retirees or survivors went to the Claims Court, while other cases based on the same facts but brought by a person who had been discharged, went directly from the MSPB to the Federal Circuit.

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commissioners of that court." (Emphasis supplied). Senate Report, pp. 7 and 8. No mention is made in that discussion of appellate jurisdiction.

Further in describing the expected caseload of the new Federal Circuit, the Committee noted that the case load of the Article III judges on the old Court of Claims are the ones to consider (not that of the commissioners). No indication is given that Congress expected this caseload to be reduced because appellate cases involving retirement would be removed from the court's jurisdiction and heard instead by the Claims Court. (Senate report, p. 7.)

C. *There Would Be Serious Negative Consequence if the Claims Court were Found to Be the Proper Forum.*

If the Supreme Court finds the Claims Court is the proper forum and there is no jurisdiction in the Federal Circuit to hear appeals from the MSPB, great confusion will reign. It may be too late for some cases now on appeal to the Federal Circuit to be transferred to the Claims Court. The proper interpretation of the six year time limit will raise new questions about the event from which the six year time limit must be judged (e.g. the date of the employee's retirement, the date of his death where the claimant is a survivor, the date on which the employee was wronged). Forum shopping will re-emerge as the public tries to decide whether to initiate a case before the Claims Court or to go first to the MSPB and then seek de novo review at the Claims Court. Decisions will not be uniform, unless they are routinely appealed to the Federal Circuit from the Claims Court.

All of the difficulties outlined above which would flow from sending retirement cases to the Claims Court can be avoided by deciding that the Congress acted in accordance with (1) the language of the statute which provides for appeals to the Federal Circuit Court except when issues of disability and dependency are at stake, and (2) the purpose expressed in the legislative history of bringing about uniformity in decision on Federal employment rights.

CONCLUSION

It would do great harm never intended by Congress to petitioners and untold others to construe the law as the Government argues. Instead, the Court should find that a right of appeal to the Federal Circuit has been provided by Congress in retirement cases, and that such appeal may be filed by retirees or their survivors.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL, *Petitioner*,

v.

OFFICE OF PERSONNEL MANAGEMENT, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The main issue in this case is whether the United States Court of Appeal for the Federal Circuit has jurisdiction pursuant to congressional enactments to review decisions of the Merit System Protection Board concerning claims for disability retirement of federal employees.

The Respondent, Office of Personnel Management, concedes that federal courts (claims court or district courts) do have jurisdiction to review the final decision of the Merit System Protection Board (Resp. Br. 8, 24, 31 and 50). It joins the Petitioner in asking this Court to "consider vacating the judgment below" (Resp. Br. 31 and 50). Respondent, no doubt, now recognizes that this Court has consistently held that retirement annuities under the Civil Service Retirement Act are a vested property right. *Dismuke* v. *United States*, 297 U.S. 167 (1936); *United States* v. *Clark*, 445 U.S. 23, 34 (1980) (Resp. Br. 18-19, 43).[1] Likewise, the Respondent realizes that the Federal Circuit below went too far in holding that it does not have jurisdiction to review an agency determination of a vested retirement annuity. This is especially so under the rubric of this Court that it will give judicial protection against unlawful agency action to rights conferred by Congress. *Leedom* v. *Kyne*, 385 U.S. 184, 190 (1958).

It appears that the Respondent also recognizes that the decision of the Federal Circuit below is inconsistent with the constitutional principle of separation of powers (Resp. Br. 31). Precluding all review is tantamount to withdrawing the power of the federal courts to decide whether agency action violated individual rights—either statutory, regulatory or constitutional.

But Respondent continues to argue that there is no direct jurisdiction under either Chapter 77 of the Civil Service Re-

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[1] In fact, the Respondent never challenges or opposes Petitioner's position that a retirement annuity is a vested property right. The Federal Circuit's decision also held the annuity was a right. (J.A. 46).

form Act,[2] the Federal Court Improvement Act,[3] or the Civil Service Retirement Act[4] (Resp. Br. 8, 9, 13, 20, 32). The issue of jurisdiction in this case turns on the intent of Congress in enacting this legislation and in protecting the rights of federal employees.[5] We described this intent in our opening brief, where we noted that Congress intended that the Federal Circuit have power to review agency violations of procedural or legal rights of federal employees in disability retirement cases to insure that the agency does not exceed its powers (Pet. Br. 10, 23, 31). Accordingly, the assertions of Respondent that Congress never intended Federal Circuit jurisdiction in this area are plainly incorrect.

1. Respondent does not deny that Congress intended to provide judicial review of agency action to federal employees whose claims or rights are affected by such action. Respondent also acknowledges that the courts have jurisdiction to review agency violation of employee rights (Resp. Br. 31, 50). However, in our opening brief we explained the three basis for jurisdiction of the Federal Circuit to review any final order or decision of the Merit System Protection Board (MSPB). This includes 28 U.S.C. 1295(a)(9), 28 U.S.C. 8347(d) and the general jurisdiction of the federal courts to protect statutorily granted rights (Pet. Br. 10, 29, 34). In our first basis for review we cite the clear language of the Federal Court Improvement Act of 1982 which specifically states that "the Federal Circuit shall have *exclusive* jurisdiction . . . of any appeal from a final order or final decision of the Merit System Protection Board pursuant to Sections 7703(b)(1) and 7703(d) of Title 5." Section 7703(b)(1) specifically states that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeal for the Federal Circuit." The language,

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[2] 5 U.S.C. § 7701, 7703.

[3] 28 U.S.C. § 1295(a)(9).

[4] 5 U.S.C. § 8334, 8347.

[5] See *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

we explained, could not be clearer. It covers any appeal from the final orders of the MSPB and includes decisions of the MSPB over disability retirement claims.

a. Under this Section the Respondent first argues that this Court should imply the exclusion of retirement appeals from jurisdiction under 28 U.S.C. 1295(a)(9) because Section 7703(a)[6] only grants a right of judicial review to an "employee or applicant for employment" while Section 8347(d) authorized appeals for "individuals" (Resp. Br. 21).[7]

The contention of Respondent is erroneous. "Employee" for purposes of Chapter 77 is defined by reference to the statute or regulation that conferred the right to appeal. *Piskadlo* v. *Veterans Administration*, 668 F.2d 82, 84 (1st Cir. 1982); *Perez* v. *Army and Air Force Exchange Service*, 680 F.2d 779, 782-787 (D.C. Cir. 1982). The subchapter on civil service retirement includes a definition for that subchapter at Section 8331(1)(A), which refers to the definition of employee under Section 2105. The crucial part of the statute covers "an individual who is—(1) appointed in the civil service by . . . (d) an individual who is an employee under this section." Thus, "employees" includes an appointed "individual." It would be illogical to reach the conclusion that once an employee is removed from service he (she) is immediately a "non-employee." If this were the correct interpretation, any employee separated from the service would not be entitled to disability retirement benefits under Section 8337(a) even though that provision for disability retirement specifically refers to "employee."

Even worse, to accept this argument of Respondent would deprive the Federal Circuit "of jurisdiction under Section 7703 of the many civil service removal petitions brought by terminated federal employees" which are reviewed daily by that

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[6] All Section references are to title 5, U.S.C., except where otherwise stated.

[7] Respondent fails to recognize that an individual includes employee.

court. *Bronger* v. *Office of Personnel Management*, 740 F.2d 1552 (Fed. Cir. 1984).

Likewise, in its regulation under the Back Pay Act (Section 5596) which entitled employees to back pay for unwarranted personnel actions, Respondent has recognized that employee means present or former employees. 5 C.F.R. section 550.803 (1983). It is most likely that Congress intended that former employees removed for cause or for reduction in force be entitled to an appeal under Chapter 77. Congress could not have intended for the review rights of employees seeking disability to depend on whether their claims were filed prior to or after separation or their status at the time their cases reached the MSPB or the court.

In this case, LINDAHL filed his claim for disability retirement on September 5, 1979. (R.I. 83-84). At that time, he was an employee of the Department of the Navy and remained an employee until October 5, 1979 (J.A. 17-20). So, the laborious arguments of the Respondent are meaningless on this issue.

However, let us assume that LINDAHL is not deemed to have filed until October 9, 1979, four days after his terminationk when he filed his formal request (J.A. 17-20). Using the same definition of employee as argued by the Respondent would prohibit LINDAHL from even applying for disability retirement. Section 8337 allows only employees to apply for disability retirement. Surely Congress could not have intended that LINDAHL would not be entitled to disability on that basis.

Since nearly all disability annuity applicants are former employees by the time their appeals reach the MSPB, it is clear that the wording 'any employee' in Section 7703(a)(1) and Section 8337 includes a former employee. *Raichovich* v. *United States Postal Service*, 675 F.2d 417, 420 (D.C. Cir. 1982); *Bronger* v. *Office of Personnel Management*, 740 F.2d 1552.[8]

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[8] Respondent has urged this Court to consider the question raised by *Bronger* and to resolve it under LINDAHL. (Resp. Br. 12-13, and

b. Respondent next argues that its position that Section 7703(b)(1) does not apply to retirement claims is also supported by Section 7701 which only applies to "employees," only concerns adverse actions, and that appeals from retirement claims are covered by Section 8347(d), which require the agency to prescribe regulations.

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n.4). It is submitted that such a procedure would be grossly inappropriate. Respondent cannot simultaneously seek to have this Court affirm the decision below in the instant case, and to reverse the decision of that Court in *Bronger*, simply by so requesting in its brief.

Furthermore, it is a well established and uniform course of appellate review procedure to decline to review questions not necessary to a decision by an appellate court. See, *e.g.*, *Sun Insurance Office* v. *Scott*, 284 U.S. 177, 52 S.Ct. 72, 74, 76 L.Ed. 2d 229 (1931). The Court of Appeals for the Federal Circuit in the opinion below specifically limited its holding as follows:

> We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a *voluntary physical disability* retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1).
>
> * * * *
>
> We need not, and hence do not, decide in this case whether all decisions of MPSB under § 8347(d)(1) are denied judicial review by § 8347(c). . . . It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this Court.

718 F.2d at 393, 399 (emphasis added). After the Brief for the Petitioner herein was filed with this Court, the Court of Appeals for the Federal Circuit decided *Bronger*, citing therein the above portion of *Lindahl*, and noting that the case before them "differs from, and is not controlled by *Lindahl*," given that it involved a claim for retirement benefits, and there was no issue of disability subject to 8347(c). Respondent's representation that two courts of appeals have reached a conclusion contrary to *Bronger* is simply wrong, given that both cases cited therein involved claims for disability retirement benefits. (Resp. Br. 13).

Petitioner is confident that this Court will reverse the decision below. But if this Court then holds that Lindahl's right to judicial

The court in *Bronger* stated that "OPM's position borders on the frivolous." *Bronger* v. *OPM*, 740 F.2d 1552. Section 7701(a) allows an employee to appeal to the MSPB from "any action which is appealable to the Board under any law, rule or regulation." Section 8347(d) provides for retirement claimants to exercise their appellate rights under Section 7701. Both provisions very clearly allow a person such as LINDAHL whose rights have been affected by OPM action on retirement benefits to appeal that decision to the MSPB. Section 7701 is not limited to employees as claimed by Respondent. *Hein* v. *OPM*, 1 M.S.P.B. 396, 400 (1980).

In fact, the MSPB has specifically held that Congress when it passed Section 7701 provided a broad grant of *de novo* review including the right for parties to appeal MSPB orders in retirement claims. *Chavez* v. *OPM*, 6 M.S.P.B. 343, 348 (1981). It held that Section 7701 applies in retirement cases, in part, because, "the Reform Act contains no provision for Board consideration of appeal, whether authorized under that act or under some other statutory or regulatory authority, which are not governed by Section 7701." *Id.* at 348-349. Under the view of MSPB, Section 7701 applies to all appeals heard by the MSPB, whether based on the Civil Service Reform Act or other statutory provisions. In *Chavez*, the MSPB rejected the contention that OPM action on a disability retirement application was not subject to *de novo* review by MSPB, as it had been

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review is controlled by *Bronger*, the only proper course is to remand this case to the Court of Appeals for the Federal Circuit (the court with exclusive jurisdiction for appeals from decisions of the MSPB), for application of its holding in *Bronger*.

If Respondent wishes to contest the holding of the Federal Circuit in *Bronger*, it must file a petition for writ of *certiorari* seeking review of *that* case in this Court. Should this Court deem it worthy of review, said petition may be granted and Respondent may then argue for a contrary result, at which time the other interested parties (e.g., *Bronger*, et al) may fully argue and brief their side.

previously by the Civil Service Commission under 5 C.F.R. 831.1205 and 772.307 (1978).[9]

The MSPB interpretation of Section 7701 deserves special deference since it is the "contemporaneous construction of a statue by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Frazier* v. *MSPB*, 672 F.2d 150, 162 (D.C. Cir. 1982).

Likewise the Court of Appeals[10] have held that appeals to the MSPB are taken pursuant to Section 7701 in retirement cases. *Turner* v. *OPM*, 707 F.2d 1499, 1501 (D.C. Cir. 1983).

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[9] The Respondent mistakenly states that the construction of Section 7701 excludes retirement claims and is consistent with Civil Service Commission and court actions practice prior to 1978 which treated adverse actions and retirement claims differently (Resp. Br. 17-20).

Prior to 1978, Congress authorized the Civil Service Commission to prescribe regulations to administer the rights of federal employees within the executive branch including appeals from adverse actions and disability and dependency claims. See Sections 1302, 5155, 7701 and 8347(c)(d) (1969).

Pursuant to this authority, the Civil Service Commission passed regulations concerning rights of federal employees to appellate hearings. See 5 C.F.R. 772.301 to 772.307 (1969). The employees affected had the same right to notice of any agency action, the right to a hearing, the right to a personal appearance, the right to produce witnesses, and the right to cross-examine witnesses. This covered removals, suspensions, reduction in rank and disability retirement claims. 5 C.F.R. 772.305 (1969).

There was no difference in treatment in adverse actions or retirement claims as contended by the Respondent at the administrative level.

[10] Respondent also asserts that there was a total difference in treatment in the courts between adverse claims and retirement claims prior to 1978. (Resp. Br. 26). It is correct that there were minor differences, but prior to 1978, both types of claims had the

c. Next, the Respondent asserts that the legislative history of the Civil Service Reform Act does not reflect any Congressional intent to grant a direct right of review, either under Section 7701 or 7703 to retirement claims (Resp. Br. 26-29). The reasons argued by the Respondent are that the 1978 history of that Act only discusses adverse actions, and not retirement claims, that Congress did not at that time make any reference in Section 8347 to either Section 7701 or 7703, and that it refers only to employees.

Contrary to the assertions of the Respondent, the legislative history indicates that Congress intended retirement claims to be appealed to the MSPB pursuant to Section 7701 and to the Federal Circuit under Section 7703. The history clearly provides that amendments to Section 7701 covered all appealable actions to the MSPB and were not limited to adverse actions. S.Rep. No. 95-969, 95th Cong., 2d Sess at 51, *reprinted in* 1978, U.S. Code Cong. & Ad. News 2773, 2775. The history also clearly reflects that Section 7703 allowed judicial review of *all* final orders of the MSPB, not merely adverse actions. *Id.* at 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2784.

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same right of review in the federal courts under the Tucker Act. They could file their petition in the Court of Claims under 28 U.S.C. 1491 from either adverse actions or retirement claims. *Kephart* v. *United States*, 75 F.Supp. 1020 (Ct.Cl. 1948) (civil service classification); *Elchibegoff* v. *United States*, 106 Ct.Cl. 541 (1947) *cert. denied*, 329 U.S. 694 (1947) (position of federal employee determined by CSC); *Peters* v. *United States*, 408 F.2d 719 (Ct.Cl. 1969) (termination); *Bayley* v. *United States*, 99 Ct.Cl. 598 (1943) (retirement). After 1964, the Congress provided for review in the district courts under 28 U.S.C. 1346. The only difference under the Tucker Act was that the adverse claims were reviewable under the substantial evidence test. *Reid* v. *United States*, 456 F.2d 777 (Ct.Cl. 1972); *Proctor* v. *United States*, 172 Ct.Cl. 608 (1965). Appeals from Civil Service Commission orders of retirement claims were subject to the *Scroggins* standard of review for legal or procedural errors. *McGlasson* v. *United States*, 397 F.2d 303 (Ct.Cl. 1966).

The Civil Service Reform Act provided a statutory basis for the changes in organization that were made by Reorganization Plan No. 2 of 1978, Section 1101, note. The Reorganization Plan specifically included retirement cases. The Civil Service Retirement Act and the Reorganization Plan were prepared as part of the same legislative package and were considered by the same Congress. S.Rep. No. 95-969, *Id.* at 30, *reprinted in* in 1978 U.S. Code Cong. & Ad. News at 2725, n. 1; S.Rep. No. 95-1049, 95th Cong., 2d Sess. 1 (1978); H.R.Rep. No. 95-1396, 95th Cong., 2d Sess. 102 (1978). Section 202(a) of the Reorganization Plan authorized the MSPB to adjudicate appeals formerly heard by the Civil Service Commission, including appeals from "determinations . . . concerning retirement applications and annuities (5 U.S.C. 8347(d))." H.R. Rep. No. 95-1396, *supra* at 10. Congress was very aware that "any action appealable to the Board" as used in section 7701(a) would include retirement decisions made appealable by section 8347(d).[11]

Also, the Civil Service Commission regulations for its appeals which included both retirement claims and adverse claims (5 C.F.R. Part 772 (1978)) were replaced by a statutory scheme (Section 7701), which codified the procedures to be used by the MSPB in hearing appeals. There was no indication either in the legislative history or in the statute itself that appellants from retirement decisions were to be excluded.[12]

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[11] The numerous appeals from agency action transferred to MSPB are listed in H.R. Rep. No. 95-1396, *supra*, at 10-11.

[12] The claims by Respondent that the 1980 Congressional amendment to Section 8347(d) specifically required Section 7701 procedures to be followed only in appeals to MSPB of involuntary mental disability cases confirms its position of Congressional intent is wrong. (Resp. Br. 27, ft. 19).

This argument is unfounded. Since the "sole purpose of the amendment was to expand judicial protection of employees through review of factual findings in a certain subset of cases, it hardly follows that Congress negatively implied its intent to strip employees of review in other cases." *Turner* v. *OPM*, 707 F.2d 1499, 1503.

Likewise, judicial review as previously provided under 28 U.S.C. 1491 and 1346 in the district courts was eliminated. Congress is presumed to have known that both retirement claim appeals and adverse actions appeals were taken to both the Court of Claims or district courts when it passed Section 7703 and to adopt that interpretation when it transferred jurisdiction to review all MSPB decisions to the Court of Appeals or Court of Claims under Section 7703 and to the Federal Circuit in 1982. It never excluded retirement claims from this review, neither in 1978 nor in 1982. Thus, it is presumed to continue. *Lorillard* v. *Pons*, 434 U.S. 575, 580.

Moreover, the Federal Circuit in *Bronger* v. *OPM*, *supra*, held that where the retirement claim is inextricably bound up with any adverse action, there is no basis for denying jurisdiction under Section 7703 on the basis that Section 7703 is only applicable to adverse actions. The same situation is present in LINDAHL. He was terminated by the Department of the Navy due to physical disability (J.A. 10). Prior to his actual termination, he requested the disability retirement annuity (R.I. 83-84). Thus, in this case, both the adverse action and retirement claim are inextricably bound up and there is no basis for denying jurisdiction under Section 7703, even if we accept Respondent's argument that this section only covers adverse actions.

d. Respondent seeks to draw the inference from the 1980 amendment to Section 8347(d) that all retirement cases other than involuntary mental cases are excluded from Section 7703. (Resp. Br. 20). This reading may appear possible if the amendment is read in isolation from the total statute and its history. However, such inference is not plausible after full examination.

The 1980 amendment was concerned with the abuse of agency initiated mental retirement cases of federal employees. Its purpose was to remove the previously existing limitation on judicial review of factual issues in disability retirement cases. S.Rep. No. 96-1004, 96th Cong., 2d Sess. 1 (1980), *reprinted in*

part, 1980 U.S. Code Cong. & Ad. News 5986; H.R. No. 96-1080, 9th Cong., 2d Sess. 2 (1980). The report of the House Committee on Post Office and Civil Service[13] reflects Congressional awareness of the cases construing Section 8347(c) as merely restricting judicial review and not barring it totally. The report also recognized that the MSPB was to have *de novo* review under Section 7701. H.R. Rep. No. 96-1080, *supra*, at 3-5. The Director of OPM supported this position to the Committee. *Id.* at 8-10.

Thus, the history of Section 8347(d) shows that the intent of Congress was to merely expand judicial review in this category of cases. It does not support Respondent's contention that cases of voluntary retirement or involuntary physical disability are thus excluded from Section 7703. *McCard* v. *MSPB*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *OPM*, 707 F.2d 1499.

2. Respondent next discusses that LINDAHL was required to bring an action under the Tucker Act for a money judgment of retirement benefits either in the Claims Court or the District Court under 28 U.S.C. 1491 or 28 U.S.C. 1346. From those courts, it argues, there would be a right of appeal to the Federal Circuit under 28 U.S.C. 1295(a)(3). It incorrectly cites *Ellis* v. *United States*, 711 F.2d 1571 (Fed. Cir. 1983) and *Morris Mechanical Enterprise, Inc.* v. *United States*, 728 F.2d 497, 498 (Fed. Cir. 1984) for that proposition (Resp. Br. 30-31). The LINDAHL case is appealable under 28 U.S.C. 1295(a)(9).

This argument of Respondent ignores the Congressional purpose in passing Section 7703. Prior to 1978 and the Civil Service Reform Act, review of all civil service appeal decisions was either in the Court of Claims or the district courts. The Senate Committee report made the following observation of this practice:

> The large number of these courts has caused wide variations in the kinds of decisions which have been issued on

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[13] The legislation originated in this committee.

> the same or similar matters. The section remedies the problem by providing that Board decisions and orders (other than those involving discrimination complaints and determinations concerning life and health insurance) be reviewable by the Court of Claims and U.S. Courts of Appeals, rather than by U.S. District Courts.

S.Rep. No. 95-969, 2d Sess. 63, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2785.

The Act placed judicial review of MSPB decisions in the United States Court of Appeals and the Court of Claims to "encourage more uniform judicial decisions in the Federal personnel area . . ." S.R.No. 95-969, *supra*, at 62, *reprinted* at 2784.

Later, Congress emphasized its desire for uniformity in the review of civil service matters by placing judicial review of all MSPB orders in the Federal Circuit pursuant to the Federal Courts Improvement Act of 1982. That court was created to have "nationwide jurisdiction over appeals in areas of the law where Congress determines there is a special need for nationwide uniformity. . ." S.Rep. No. 97-275, 97th Cong., 2d Sess. 2 (1981) *reprinted in* 1982 U.S. Code Cong. & Ad. News, n. 2 at 12. Congress wanted to do away with "inconsistent decisions on the same issue" and to prevent dispersed review where "courts apply the law unevenly when faced with the facts of individual cases." *Id.* at 3, *reprinted* at 13.

The Senate report stated that 28 U.S.C. 1295(a)(9) "gives the Court of Appeals for the Federal Circuit jurisdictionof any appeal from a final order or decision of the MSPB." S.Rep. No. 97-275, *supra*, at 21, *reprinted* at 31. The Federal Circuit recognized this jurisdictional grant in *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983) where it stated that all appeals from the MSPB under Section 7701 "must go to this court."

Congress also sought to eliminate the unnecessarily detailed and prolonged process of judicial review under prior law, which involved duplicative review of administrative record in civil service cases first by the district court and then by the

Court of Appeals. S.Rep. No. 95-969, *supra*, at 52, 62, *reprinted in* U.S. Code Cong. & Ad. News, 2774, 2784. This would be a waste of judicial resources. *Polcover* v. *Secretary of the Treasury*, 477 F.2d 1223, 1225 (D.C. Cir. 1973) *cert. denied* 414 U.S. 1001 (1973).

The two-step review by the Claims Court or the district court, then by the Court of Appeals of retirement decisions would be contrary to this Congressional purpose. The dual goals, decisions uniformity and the elimination of duplicative judicial review, would be undermined by accepting Respondent's argument. Aggrieved persons would be required to seek review of MSPB retirement decisions in the Claims Court or the district courts. Some retirement appeals, because they do not involve money claims against the United States, cannot be heard under the provision of the Tucker Act. *Baker* v. *United States*, 614 F.2d 263, 271 (Ct.Cl. 1980); *In Re Jancovic*, 204 Ct.Cl. 807 (1974). Such cases would only be filed in the district court and those decisions would not be subject to review in the Federal Circuit.

In addition, 28 U.S.C. 1295(a)(9) grants exclusive jurisdiction over appeals from a final order of the MSPB to the Federal Circuit. Thus, if this case were before the Claims Court, Respondent could and probably would argue that, pursuant to 28 U.S.C. 1295(a)(9), that court does not have jurisdiction over this matter. However, if Respondent did not argue that position, the Claims Courts might well find on its own initiative that it lacked the necessary jurisdiction based on the decision of the Federal circuit in this case or its own reading of Section 8347. Therefore, to accept Respondent's position would be equivalent to precluding all determinations of judicial review here.

3. The Respondent also argues that any jurisdiction over retirement appeals by the Federal Circuit is precluded by the clear wording of Section 8347(c) which, it claims, manifests a Congressional intent to preclude review of physical disability retirement claims (Resp. Br. 35).

First, the language of Section 8347(c) supports LINDAHL's position that it was only intended to limit review of factual errors in agency action. The finality clause of Section 8347(c) preserves for either the Respondent or the MSPB the underlying factual basis for disability and dependency. The sentence immediately after the finality clause of Section 8347(c) provides that "The office may direct at anytime such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter." Thus, it would seem that the finality clause of Section 8347(c) indicates and is compatible with judicial review of decisions of the MSPB in non-factual matters, such as procedural infirmities or legal errors. *Turner* v. *OPM*, 707 F.2d 1499, 1502.[14]

Next, the language of Section 8347(c) does not provide clear and convincing evidence that Congress intended to foreclose judicial review. This Court has consistently held that the right to judicial review of agency action will not be prevented absent clear and convincing evidence of Congressional intent. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). And where there is doubt or uncertainty, that is sufficient to prohibit the foreclosing of judicial review. *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). Contrary to the assertion of the Respondent, the words of Section 8347 in their entirety do not provide the clear and convincing evidence of intent by Congress to foreclose the review sought here. The finality words when taken in context manifest an intent to limit judicial review and not eliminate it. Congress could have done so by using the same words used in the Veterans Benefit statute, "no other official or court of the United States shall have power or jurisdiction to

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[14] The contention of Respondent that the presumption of judicial review over agency action does not apply in suits for monetary recovery is without basis. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975) (suit for union office); *de Magro* v. *United States*, 636 F.2d 764, 765 (D.C. Cir. 1980) (widow's life insurance benefits); *Carter* v. *Cleland*, 643 F.2d 1, 3 (D.C. Cir. 1980).

review such action." 38 U.S.C. 211(a). Congress used similar language in the Medicare and Federal Employee Compensation statutes, Section 8128 and 42 U.S.C. 1935(j). These latter three statutes are clear and convincing evidence that Congress intended to preclude judicial review which is untrue here.[15] They are unlike Section 8347.

Section 8347 evinces the intention of Congress to bar only judicial review of factual questions of disability and of dependency. *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982). This is consistent with the presumption favoring judicial review of agency action for procedural or legal errors.

4. Respondent next attacks the *Scroggins* standard of review of agency rulings on disability retirement. It claims that the *Scroggins* formula was incorrect because the Court of Claims in 1962 had never considered the statutory preclusion of review under Section 8347(c), that the Court's decision in *United States* v. *Erika, Inc.*, 456 U.S. 982 (1982) undermines *Scroggins*, and that the 1980 amendment to Section 8347(c) eliminated the need for *Scroggins*.

The Respondent misses the point in making these arguments to support the decision of the Federal Circuit below. The issue is not what the *Scroggins* court did or did not do,[16] nor the

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[15] The Respondent points to the Federal Employees Compensation Act and the Veterans Benefit Act and cases interpreting them to support its position of non-review in disability retirement. (Resp. Br. 37-38). However, a further distinction is that disability retirement is a vested property right of the federal employee based on his or her contributions from his or her salary. And judicial protection is afforded to property interests. *Dismuke* v. *United States*, 297 U.S. 167, 170 (1930). Veterans benefits are in the nature of a gratuity given by a grateful nation for help. *Koelfer* v. *Johnson*, 355 F.Supp. 243, 251 (D.Minn. 1960). Richard A. Warren, Personnel Administrator v. Feeney: A Policy Decision. 34 *U. Miami Law Rev.*, 343, 346 n.21 (1980). Likewise, federal workers compensation is deemed to be a charity. *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922).

[16] However, the Court of Claims did give careful consideration to the language of Section 8347 and this is clear from the opinion where

effect of *Erika* on *Scroggins*. The central issue is the intent of Congress in passing and amending Section 8347. The best way to interpret the meaning of a statute is to examine its legislative history.

The Court in *Erika, Inc.* did not regard the plain language of the Medicare statute as sufficient in itself to resolve the issue of the preclusion clause. Instead, the Supreme Court felt required to look at the legislative history of the Medicare statute to determine the Congressional intent and to explain the logic behind the preclusion of judicial review. The Federal Court below avoided all references to *Erika, Inc.* because it would have required that it examine the legislative history.[17] *United States* v. *Erika, Inc.*, 456 U.S. 982. The Respondent incorrectly argues that *Erika, Inc.* supports the Federal Circuit's decision in LINDAHL. It ignores the precisely drawn provisions and legislative history of the Medicare statute.

"The legislative history of the 1980 amendment also indicates that Congress amended the statute based, in part, on the OPM's representation that Section 8347(c) already allowed limited judicial review of all disability proceedings . . . [and indicated that] Congress merely wished to expand judicial review for involuntary disability retirement determinations based on an employee's mental condition, not that Congress

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it states that the statute places "a special and unusual restriction on judicial examination." *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct.Cl.) *cert. denied*, 343 U.S. 952 (1968). This was also true of the courts in *Gaines* v. *United States*, 158 Ct.Cl. 497, 501-2, *cert. denied*, 371 U.S. 936 (1962) and *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct.Cl. (1966).

[17] The Court in *Erika, Inc.* specifically stated that judicial review was foreclosed in the precisely drawn provisions of the Medicare statute. *Id.* at 6-7. In that sense, the retirement benefits are different from the Medicare benefits. But further, the Court stated that the legislative history of the Medicare statute provides clear evidence of Congressional intent to limit judicial review. *Id.* at 9. No such history exists to support exclusion under Section 8347.

believed the law barred all judicial review of disability determinations." *Parodi* v. *MSPB*, 690 F.2d 731, 736.

The legislative history indicates that Congress was aware of the *Scroggins* rulings and did not intend to alter the effect of those rulings, except to expand the review. H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. 4 (1980). In fact, by reenacting this legislation in 1980 with alterations, it is presumed to have adopted the judicial interpretations of the statute including the *Scroggins* formula to review disability retirements.

Thus, the Federal Circuit was incorrect in failing to read the legislative history of Section 8347 and it erred in its interpretation of that statute by precluding review where Congress only intended to limit review.

5. Finally, Respondents assert that there was no error committed by the MSPB because the burden of proof was correctly placed upon him (Resp. Br. 34-35). Again, Respondent is incorrect.

First, the burden of proof is placed upon the agency because it is so stated in the congressional enactment (Section 7701(c)). It requires that the agency decision be supported by a preponderance of evidence. The legislative history clearly states that the "agency will have the initial burden before the Board of going forward with the case." S.Rep. No. 95-969, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News, 2723, 2766.

As previously shown, Section 7701 was intended by Congress to apply to both adverse actions and disability retirement claim appeals to the MSPB (Reply Br. 6-8). Section 7701 was also interpreted by the MSPB to apply to disability retirement appeals. *Chavez* v. *OPM*, 6 M.S.P.B. 343, 348. The courts have so held. *Turner* v. *OPM*, 707 F.2d 1499, 1501.

Next, the regulations of the MSPB provide that the agency has the burden of proof in any action brought before the MSPB. 5 C.F.R. 1201.56. And these regulations have been drawn up pursuant to Section 8347(d)(1).

So, the MSPB both violated the statutory provision and violated its own regulation. Notwithstanding any law to the contrary, this is a violation of due process and warrants judicial review and reversal of the agency action.

Likewise, the standard of proof used by the MSPB was incorrect. It required LINDAHL to prove that "he has a disease which rendered him totally disabled for useful and efficient service in his last occupied position" (J.A. 40). However, the correct standard of proof is an "inability to perform useful and efficient service in the last job." *Parodi* v. *MSPB*, 690 F.2d 731, 739. This also constituted a due process violation which was entitled to review by the Federal Circuit.

For these reasons, as well as for the reasons stated in our opening brief, the judgment of the Court of Appeal for the Federal Circuit should be reversed.

Respectfully submitted,

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